# Commercial Law Series
## Sales

## AMERICAN COMMERCIAL LAW SERIES

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AMERICAN COMMERCIAL LAW SERIES

VOLUME III

# SALES OF PERSONAL PROPERTY

CONTAINING THE TEXT OF

THE UNIFORM SALES ACT

AND THE

UNIFORM BILLS OF LADING ACT

WITH

QUESTIONS, PROBLEMS AND FORMS

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## PREFACE TO THIS VOLUME.

The Law of Sales of Personal Property is of importance to every one. In this Volume, the general rules are given as clearly and concisely as possible. The Uniform Sales Act, now in force in several states, is given in Appendix A. and frequent reference to, and quotation from, that Act is made in the text. It is to be hoped that this Act will be as popular with legislatures as the Uniform Negotiable Instruments Law has been. The Uniform Bills of Lading Act is also given in Appendix B. The states in which these Uniform Acts are in force is stated at the beginning of the Appendices containing them. See pages 95 and 139. The states which so far have adopted the Uniform Warehouse Receipt Act are also named at page 137, although the text of the Act itself has not been included.

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# THE LAW OF SALES OF PERSONAL PROPERTY

## PART I.

### FORMATION OF CONTRACT OF SALE.

## CHAPTER 1.

### DEFINITION AND GENERAL NATURE.

**Sec. 1. DEFINITIONS. "A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." "A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price." "A contract to sell, or a sale may be absolute or conditional." [1]**

The law which governs contracts to transfer the ownership of goods, and the actual transfer of such ownership, from one person to another for a monetary consideration is called the law of "Sales of Goods," or more briefly, "Sales." The law of sales thus concerns itself in the first place with the contract thereafter to pass a title, in the second place with the actual passing of title itself, and in the third place with the results of the sale, or the

1. Uniform Sales Act, Sec. 1. For text of Uniform Sales Act, and note as to states adopting it, see Appendix A.

obligations which endure after ownership has been transferred. In any particular transaction one or more of these situations may be wanting, or they may all exist. (1) Thus A may engage with B that A will secure for and sell to B certain wagons which B agrees to buy. Now in such case no transition of ownership has as yet been effected. If A refuses to carry out his contract B has no ownership in or claim against the wagons themselves but is left to his remedy in a suit for damages occasioned by the breach. (2) Or, pursuant to the contract, A may make an actual transfer of ownership to B. He may do this, as we shall find, even though he may perhaps still retain the possession of the wagons for the time being. In such a case title—that is to say, the ownership of property in the goods—has been transferred; B may claim the wagons as his own, and if A wrongfully refuses to deliver them or, having delivered, wrongfully retakes them, B may have the aid of the courts to secure his property. This transaction constitutes the *sale* as distinguished from the *contract to sell.* A sale need not, however, be preceded by any distinct, preliminary contract such as mentioned, but all the proceedings may consist in one transaction wherein the ownership is transferred and the price paid. Yet even in such case there would usually really be a contract to sell, followed by the sale, though the interval between the two might be almost or quite inappreciable. (3) After B has secured his title there may still be existing contractual obligations. A may have undertaken to do something further to the goods, or in reference to them; or B may have undertaken that A may have the goods again if he, B, does not pay the price

within a certain time. Our treatment of the law of Sales will take us into all this subject matter.

The term "sales," it will thus be seen, is used in two ways: first, in a general way, to cover both the executory transaction wherein title does not yet pass and the executed transaction wherein it does, and also in a more limited way, to distinguish the latter transaction from the former. It will hereafter be used in both senses, as the context will indicate.

The term "conditional sale" is correctly used to describe two situations. The first is that situation in which one transfers the ownership of goods to another upon a provision that the ownership shall come back and revest in him if he, the seller, does something within a certain time, or providing the buyer does something or fails to do something within a certain time.

The usual transaction, however, which this term is used to describe, is the familiar one in which one transfers the possession of goods to another but provides that title shall not vest in the other until the purchase price is paid or some other act done. The title is retained for purposes of security. Selling goods on the installment plan and providing that the title shall remain in the seller until the last installment is paid is a familiar example.

**Sec. 2. SALES DISTINGUISHED FROM BARTERS OR EXCHANGES. A barter or exchange consists in a transfer of goods, or a promise to transfer goods, by one person to another in consideration of a like act or promise on the part of the other.**

There is little value in distinguishing, for our purposes, between barter and sale except to indi-

cate the nature of the consideration. Technically, a sale is for a *price*, that is to say, for money or a promise to pay money while a barter is an exchange of chattels. Where the term "sale" is used in a broad sense it includes barter. Thus in a Massachusetts case a saloon keeper was indicted for unlawfully *selling* liquor. He had in fact *bartered* it for gain. But the Court sustained a charge against him for *selling* liquor contrary to law.[2]

**Sec. 3. SALES DISTINGUISHED FROM GIFTS. A gift is a transaction wherein one person for no consideration, that is, gratuitously, transfers to another ownership in property.**

There is a fundamental distinction between a gift and a sale. One is a purely gratuitous act, whereas the other is contractual in nature, imposing obligations enforceable in the courts. A promise to make a gift is unenforceable; if broken there is no remedy. If the gift is made, the giver parts with whatever title he had and no more. In fact, if he have creditors hindered or delayed from the collection of their claims by such gift, such creditors may have it set aside as a transfer which is fraudulent as to them. But a sale may in many cases give a better title than the seller himself had. That subject is discussed more at length hereafter. And even an insolvent debtor may *sell* his goods to a purchaser in good faith (subject, of course, to the lien of such mortgages, judgments, etc., as may be of record and in force).

2. Commonwealth v. Clark, 14 Gray (Mass.) 367, and see Mechem on Sales, Secs. 13 to 18.

**Sec. 4. SALES DISTINGUISHED FROM BAILMENTS. Whether a transaction which involves a change in possession of goods effects a transition of ownership and therefore constitutes a sale, or does not effect such transition and therefore constitutes a bailment, depends, as between the parties, upon their intention, as determined by the usual rules for the construction of contracts.**

In the majority of cases there is little difficulty in determining whether one who holds goods holds them as bailee for the owner or as purchaser from him. Yet the question may arise where an owner gives possession of his goods to another and it is disputed whether he simply gave the possession and not the title, or whether it was meant that ownership should also pass; as where A who is a wholesaler of typewriters places 100 of his machines with B, a retailer, and it is disputed whether he has sold to B on credit or retained title; or, where one delivers leather to another to be made into shoes, and it is a question whether the same leather must be made into the shoes or whether other leather might be chosen. A bailment exists whenever one comes into the possession of goods that belong to another. A sale involves a transfer of ownership; a bailment involves the separation of the ownership from the possession. Where one parts with the possession of goods which he owns under an agreement that those *same* goods, either in the same or altered form, are to be returned, or disposed of according to his order already given or to be given, the transaction is a bailment. If the agreement does not contemplate such return, but contemplates that the recipient of the goods either must or may return some equivalent for them, the transaction is a sale

or barter and not a bailment. Thus if A delivers to B a quantity of leather which B is to manufacture into shoes for A this is a bailment. But if B is to pay a monetary value for such leather, or if he is to return shoes made out of other leather, or if he has the privilege of returning shoes made out of other leather the transaction is a sale or barter and not a bailment. In the event of loss of the leather or damage to it by fire or other casualty without B's fault, the damage must in the first case fall upon A, because it is *his* property which is destroyed or damaged, and he cannot call for the delivery of any shoes; in the other cases the damage would be upon B, because it is *his* property which is lost or damaged, and B must still live up to his agreement, or pay damages for its breach.

And so where one sends goods to another *on consignment* to be sold or disposed of for the benefit of the sender, title does not pass and the recipient is not owner, but bailee. Thus if A, a wholesale manufacturer of wagons, sends 50 of these to B for him to sell upon commission, returning all unsold wagons, this is a bailment and B has no ownership in the wagons; he sells them as A's agent. B is a bailee and not a purchaser.[3]

We have stated that in order to constitute a bailment the party receiving the goods must be obliged to return those *same* goods, either in the same or an altered form; still we have an apparent exception in the case of those goods which are described as *fungible*. Fungible goods are those goods which are composed of indistinguishable

3. In re Columbus Buggy Co., 143 Fed. Reporter, 859; Mechem on Sales, Sec. 43.

parts or units, so that the distinction of one part from the others is a matter of no moment and no unit or part has, or in the nature of the case can have, any value over another. If such goods are delivered to a bailee under an agreement that he may mix them in a bin, tank or warehouse with goods of like quality and return a similar quantity to the depositor, the transaction is accounted a bailment, upon the theory that it is practically an agreement to return the *same* goods. Such goods include grains, flour, oil, etc., but not logs, chairs, etc., which may be alike as a matter of fact but are not necessarily so.

Thus A puts grain in B's public granary, understanding that B will store the grain in bins that contain grain of like character. B is a bailee and not the owner of such grain. If ten parties have deposited wheat with him which he has put in the same bin, it is his duty to keep that quantity on hand to satisfy the demand of the depositors.[4]

4. Yockey v. Smith, 181 Illinois Reports, 564; Mechem on Sales, Sec. 25 ff.

(A bailment, as the text states, exists whenever the owner of goods is entitled to their return, either in the same or altered form. Bailments have been classified into three sorts: those for benefit of bailee, as where goods are borrowed; those for benefit of bailor, as a gratuitous keeping; those for the benefit of both, which is the usual bailment. Bailments are also classified into exceptional bailments, as those of common carriers, innkeepers, etc., where the bailee is an insurer, or practically so, of the safety of the goods; and ordinary bailments, in which the bailee is chargeable only with a fair degree of care.)

## CHAPTER 2.

### FORMALITIES EVIDENCING THE MAKING OF THE CONTRACT.

**Sec. 5. FORM OF CONTRACT OF SALE. "Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal) or by word of mouth, or may be inferred from the conduct of the parties."** [5]

There is, as discussed in the next section, in the majority of the states a "Statute of Frauds," requiring that some contracts to be enforceable must be in writing and signed. The uniform sales act contains such a provision. Subject to provisions of this sort, the parties may put their contract in any form they may desire. It may be oral, or in writing, or it may be simply implied from circumstances.

**Sec. 6. FORMALITIES REQUIRED IN CERTAIN CASES. PROVISIONS OF THE "STATUTE OF FRAUDS" AND UNIFORM SALES ACT. By the 17th section of the English Statutes of Frauds, substantially copied by enactment in many of the states, and by section 4 of the Uniform Sales Act, a contract to sell or a sale of goods at a price amounting to or above a certain sum is not enforceable in the courts unless a payment has been made upon the bargain or unless part of the goods have been accepted and actually received by the buyer or unless some memorandum**

**5. Uniform Sales Act, Sec. 3.**

**in writing of the contract or sale has been signed by the party sought to be charged or by his duly authorized agent.**

Statutes substantially to this effect are in force in the following states and territories: Alaska ($50); Arizona ($500); Arkansas ($30); California ($200); Colorado ($50); Connecticut ($100); District of Columbia ($50); Florida (of any amount); Georgia ($50); Idaho ($200); Indiana ($50); Indian Territory ($30); Iowa (of any amount); Maine ($30); Maryland ($50); Massachusetts ($500); Michigan ($50); Minnesota ($50); Mississippi ($50), Missouri ($30); Montana ($200); Nebraska ($50); Nevada ($50); New Jersey ($500); New Hampshire ($33); New York ($50); North Dakota ($50); Ohio ($2500;) Oklahoma ($50); Oregon ($50); Rhode Island ($500); South Carolina ($50); South Dakota ($50); Utah ($200); Vermont ($40); Washington ($50); Wisconsin ($50); Wyoming ($50). In the following states there is not at present any such law in force: Alabama, Delaware, Illinois, Kansas, Kentucky, Louisiana, New Mexico, North Carolina, Pennsylvana, Tennessee, Texas, Virginia, and West Virginia.

The English "Statute of Frauds" was passed to prevent "frauds and perjuries," that is, false testimony in respect to alleged transactions.[6] Clearly, if the law requires a plaintiff who alleges a breach of contract of sale to produce written evidence of the contract, signed by the other party, there can

6. The statute of frauds requires that many other contracts must be in writing. For a discussion of the statute in respect to other kinds of contracts, see Volume I of this series.

be no perjury on his part in that respect, and neither can the other party swear contrary to such written evidence, except to prove it a forgery or fraudulently obtained. The statute also allows, however, the enforcement of a contract of sale when there is no writing, if it has been partly performed by some payment or by delivery and acceptance of some part; for, these things furnish corroborative evidence of the sale alleged.

The following should be observed in reference to this statute:

*First*: It does not apply at all if the goods are sold for a sum less than a certain value, this value differing in different states. The English statute provided for sales of ten pounds sterling or upwards.

*Second*: In some of the states there is no such provision in force, and a sale in such states is enforceable, though for any amount, though the transaction be entirely oral and entirely unexecuted.

*Third*. The provision concerns the enforcement and in no sense the validity of the transaction. Therefore, if the contract of sale has been *executed*, or if the defense is not relied upon by the party sought to be charged, the provision has no application.

**Sec. 7. STATUTE OF FRAUDS NOT APPLICABLE IF PRICE IS LESS THAN A CERTAIN AMOUNT. The statutes of frauds of the various states name a certain price at and beyond which sales are to be unenforceable unless the other provisions of the statute are satisfied. To bargains below that price the statute has no application. This price varies in the different jurisdictions.**

If a bargain is for less than the price named in the statute, it is enforceable though there is no written memorandum and though there has been nothing paid and no part of the goods delivered. For in sales of small amounts it would be a matter of too great inconvenience to require the formalities required in sales of greater moment, and the law considers that a party will not for the smaller sums be so strongly tempted to commit perjury, or if he does so, the hardship is not enough to overcome other considerations. Accordingly the statute does not include sales which are below a certain amount.

If several articles are purchased at one time and under one contract the statute applies if the aggregate price is of or above the amount named in the statute, although each article was separately priced at an amount below the amount named in the statute. The test would be whether or not the contract was all *one* contract and not several contracts.[7] A comes to B's residence and offers B $10 for a chair, $5 for a lamp, $3 for a stool, and $35 for a bookcase. B accepts this offer. He afterwards refuses to deliver the articles. Nothing has been paid and there has been no memorandum. A statute is in force in reference to sales in sums of $50 and upwards. B can plead this statute in defense, for the contract of sale is all one, having been made at one time and as one transaction.[8]

**Sec. 8. STATUTE OF FRAUDS NO DEFENSE IF PAYMENT HAS BEEN MADE IN WHOLE OR PART. If there has been a payment by the buyer the contract is enforceable by or against him though it is otherwise unexecuted and though it is entirely oral.**

7. Mechem on Sales, Sec. 349, 350.
8. See Baldy v. Parker, 2 B. & C. 37.

Any payment made at the time, or (in some jurisdictions) after the making of the bargain and before suit is brought, for the purpose of binding the bargain, or in part payment thereof, is sufficient to prevent the defense of the statute through it is entirely executory and not in writing.

A sells B an automobile for $1200. There is no writing and the automobile has not been delivered, but B gave and A accepted $10 in part payment. Neither party, on being sued, can plead the statute of frauds in defense.[9]

**Sec. 9. STATUTE OF FRAUDS NO DEFENSE WHERE THERE HAS BEEN DELIVERY AND ACCEPTANCE OF ALL OR PART OF THE GOODS. A delivery and actual acceptance of the goods or any part of them at the time of making the bargain or before suit brought is sufficient to enable the party suing to prove the contract though it is entirely oral and no part of the price has been paid.**

Note that there must be both delivery by the seller and actual acceptance by the buyer. If the seller attempts to make delivery, but the buyer refuses to accept, the contract cannot be proved unless there has been a part payment or a written memorandum. It is sufficient if the delivery and acceptance is in part only. If articles of a miscellaneous sort were all bought under one contract of sale, the delivery and acceptance of any one

9. "One of the old writers says that 'If all or part of the money is paid in hand; or if I give earnest money albeit it be but a penny' the contract is valid." Wier v. Hudnut, 115 Indiana, 525, holding that the furnishing of sacks for sacking corn in part payment for the corn, prevented the defense of the statute.

of these articles would be a sufficient delivery and acceptance to satisfy the statute and permit the enforcement of the entire contract. But if articles are bought under separate contracts, the performance or part performance of one of these could not be relied on in aid of another.

Delivery and acceptance does not necessarily involve *removal* of the goods, although that would be the usual case, but in the event of delivery and acceptance, without removal there would have to be some act showing clearly that one party meant to deliver, and the other to take control of the property.[10]

**Sec. 10. STATUTE OF FRAUDS NO DEFENSE WHERE THERE IS A SUFFICIENT SIGNED MEMORANDUM. If there has been no payment and no delivery and acceptance of the goods or any part of them then the statute requires a memorandum signed by the party sought to be charged.**

There being no sufficient performance to take away the defense of the statute of frauds, there must be a memorandum signed by the party sought to be charged. Of this it should be noted:

*First.* The memorandum need not be of a *formal* character; it may be in the form of a note, letter, receipt, entries in book, telegrams, etc., provided these contain a sufficient memorandum and be signed. It may also consist in a series of papers, if, all together, they go to make up or express one contract.[11]

10. Shindler v. Houston, 1 New York Reports, 261.
11. Louisville, etc., Co. v. Lorick, 29 South Carolina Reports, 553.

*Second.* That, in most states, the memorandum *need not be made at the time the contract of sale is made*, but it is sufficient if it be made any time thereafter but before suit is begun. This accomplishes the purpose of the statute, as that is merely for the prevention of frauds and perjuries. It is therefore immaterial when the memorandum was made and signed by the party sought to be charged or his duly authorized agent.

*Third.* The memorandum *must state all the material terms* of the contract and leave no material term to be orally proved. All of the contract must be proved by the memorandum or memoranda. It must state the *names* of or describe the parties, though the name in the signature would be sufficient. It must state the *price* agreed upon; provided there *was* a price agreed upon; but if the parties had left the price to inference, then, as the law will under such circumstances imply an agreement to pay a reasonable price, the contract is enforceable. It must describe the *subject matter*, or refer to it in such a way as to plainly identify it. So all the other substantial terms of the contract must be stated.

*Fourth.* The memorandum *must be signed* by the party sought to be charged and need not be signed by the other party. By the party sought to be charged is ordinarily meant the defendant. Unless the statute uses the term "subscribed" instead of "signed" the signature need not be at the bottom of the memorandum but may be any place in the writing, provided it was intended as a signature. Any mark or writing intended as a signature and which can be so proved would be sufficient. Thus signature by initial would be sufficient. If the contract consists in several

memoranda, they must all be signed, or else those that are signed must make a sufficient reference to the others to identify them.[12]

*Fifth.* The *memorandum and signature may be made by agent* duly authorized for that purpose. Any agent having a special authority to make the bargain, or a large general authority wherefrom the authority to make the particular bargain could be inferred, would also have authority impliedly given therewith to make the memorandum and sign his principal's name thereto. Thus suppose that A orally appoints B general manager of his store, to buy and sell the stock in trade, etc. B would have implied authority to comply with the statute of frauds in purchases and sales.

**Sec. 11. WHAT IS A CONTRACT OF SALE WITHIN THE STATUTE. The weight of authority is that any contract is one of sale and therefore within the statute of frauds which is intended to result in transferring title, but by the "New York Rule," if the chattel is not in existence at the time of the contract but is to be produced by one of the parties, it is a contract of work and labor and not of sale, so far as the statute is concerned; by the "Massachusetts Rule" the statute is not applicable if it is something to be made on special order. The Uniform Sales Act applies the Massachusetts Rule.**

In principle it would seem clear enough that every contract whereby it was intended then or afterwards to transfer title to personal property is a contract of sale within the meaning of the statute of frauds. There has been a tendency, however, on the part of many judges to restrict the

12. Louisville, etc., Co. v. Lorick, *supra.*

operation of the statute of frauds wherever possible. Accordingly we find it declared in some jurisdictions that if an article is ordered from one who does not have it then on hand but must make it before he can fill the order, this is a contract of *work and labor* and not of sale, and therefore the statute of frauds is not applicable. This is called the New York Rule.[13] Another rule is that if the article ordered is not one of regular stock but must be made specially on peculiar lines, it is a contract of work and labor, but otherwise it is a contract of sale. This is called the Massachusetts Rule,[14] and it is the rule adopted by the Uniform Sales Act.[15] The third rule is that if a contract effects or contemplates the transfer of title, it is a contract of sale, whether the goods are on hand or yet to be made and without reference to whether they have been specially ordered or not. This has been the rule heretofore in the majority of states. It is called the "English Rule."[16]

Thus suppose that A contracted with B that B should sell him a wagon then in B's stock, for $150. There was no memorandum, no delivery and no payment. It is everywhere agreed that the statute of frauds is a good defense to the enforcement of this contract.

A contracted with B that B should sell him a wagon, made by B and kept regularly in stock by him, but of which B had then none on hand. There was no writing, no delivery and no payment. By

13. Cooke v. Millard, 65 New York Reports, 352.
14. Goddard v. Binner, 115 Massachusetts Reports, 450.
15. Uniform Sales Act, Sec. 4 (2). (This changes the rule for New York, as it has adopted this act.)
16. Lee v. Griffin, 1 Best & Smith's Reports, 272.

the New York Rule, this being a contract of "work and labor" and not of sale is enforceable and the statute of frauds has no application. But by the Massachusetts Rule and the English Rule the statute would be a good defense to the enforcement.

A contracted with B, a wagon maker, that B should make up for him a special delivery wagon, of a peculiar size and appearance, with A's name and business painted thereon. There was no writing, no delivery and no payment. By the English Rule the statute of frauds is a defense, but by both the New York Rule and the Massachusetts Rule this contract is regarded as a contract for work and labor and not of sale and therefore the statute of frauds is no defense to its enforcement.[17]

17. See Mechem on Sales, Secs. 304 and 326.

## CHAPTER 3.

### THE CONTRACT'S OBLIGATIONS AS AFFECTED BY THE EXISTENCE OR THE DESTRUCTION OF THE GOODS.

**Sec. 12. GOODS NOT YET IN EXISTENCE. If goods have as yet no existence, either actual or potential, the title can not be passed though there may be a contract to sell them. An attempted sale of goods to come into existence will operate as a contract to pass the title to them after they have come into existence.**

One may *contract to sell* goods which have as yet no existence, but he cannot *sell* them. That is to say, he cannot now before the goods have come into existence so dispose of their title that when they do come into existence they shall without further act belong to the buyer. Pursuant to the contract there must be something further done to the goods after they have come into existence, as setting them apart, or delivering them, in order to transfer title.[18] If goods have actual existence and are ascertained they may be the subject *either* of a contract to sell or of a sale. If they have as yet no existence they may be the subject of only a contract to sell. Yet we must define our term "existence" within the scope of this rule. Existence, it is said, may be "actual" or "potential", and if goods have *either* sort of existence title to them may

18. Low v. Pew, 108 Massachusetts Reports, 347.

be passed if such is the intention of the parties. Goods have potential existence when they are to arise or spring out of something which has actual existence and which is owned by the seller. Thus one may sell the young to be born of his animals, or the wool to be grown on his sheep, or the perennial produce of the land, or his future annual crops.[19] These, however, constitute practically all the sorts of potential existence recognized by the cases. In such a case the purchaser can claim as his own the subject of the sale as soon as it comes into actual existence. No further act is necessary. This presumes, of course, that the transaction was indeed a *sale*, that is, so intended by the parties, and not a mere contract to sell, and purported to pass a present ownership. On the other hand, if goods have not even a potential existence they cannot be sold, no matter what the intention of the parties or how clear and strong their language. They may indeed be the subject of a contract to sell, and if there has been an attempted sale it will operate as a contract to sell,[20] but, as was explained, in that event the buyer gets thereby no title. Something further must be done in order to transfer title; that is, the contract to sell must be executed after the goods come into existence. Until that time the purchaser has only his action for damages. Thus A "sells" to B fish

19. But in some states the crops must at least be planted. Stowell v. Bair, 5 Illinois Appellate Court Reports, 104; Redd v. Burras, 58 Georgia, 574; Weller v. Hill, 65 Minnesota, 273; Hutchinson v. Ford, 9 Bush (Kentucky), 318; Comstock v. Scales, 7 Wisconsin, 159; Jones on Chattel Mortgages, 4th Ed. Sec. 158.

20. Uniform Sales Act, Sec. 5 (3).

yet to be caught by him. This does not put the title in B as the fish are caught. A must confer the title by some unequivocable act after the fish are caught. If he sells the fish to C, C gets a good title and B has only his action for damages.

**Sec. 13. DESTRUCTION OR DETERIORATION OF THE GOODS BEFORE THE MAKING OF THE CONTRACT. If one attempts to sell specific goods which without his or the buyer's knowledge have been destroyed in whole or in part, or have materially deteriorated in whole or in part, there is a mistake which prevents a contract from arising and neither party can aver breach; yet the law permits the buyer in case of part destruction or deterioration to take the part remaining or the deteriorated goods.**

It is well settled in the law of contracts that if there is a mutual mistake in the minds of the parties to an agreement as to the existence of the subject matter thereof there is really no meeting of minds and therefore there is no formation of contract. This principle is applicable to the law of sales. If a contract is made to sell goods, whether title is to pass now or later, and before the time of making the contract, but unknown to the parties, the goods had been destroyed, then neither party may be charged with breach. There was really no contract to be broken. We shall note hereafter that where one orders goods by description or by sample he thereby undertakes that he will supply goods of a certain quality, and it is immaterial that his stock or the material from which he expected to supply them has been destroyed, where it is not the stipulation of both parties that they shall be supplied out of certain ascertained stock

or material. But if the seller and buyer are negotiating concerning *certain known and ascertained goods*, then their agreement cannot attach to any other goods whatsoever; and in such case the prior destruction of such subject matter, unknown to either, creates in their minds a mutual mistake preventing the formation of contract. Thus A owns a certain wagon which B desires to buy. Pending the negotiations the wagon is destroyed by fire. Neither party knowing of this, a bargain is struck. The destruction of the wagon while still belonging to A puts the loss upon him, and it prevents B from alleging breach of contract. But had A contracted to deliver to B "ten Imperial wagons, No. 3", no particular wagons or lot of wagons being specified, the destruction of certain wagons A had in mind would be no excuse.

What has been said of total destruction is true also of partial destruction or material deterioration.

The law provides, however, that if the buyer elects, notwithstanding, to take the deteriorated goods or the part that remains, he may do so by paying the price that he would have paid had there been no such mistake as to quality or existence; or in case the contract is divisible, that is, made up of parts, so that the price of the whole is plainly referable to the number of unit parts in the whole, then he may have the contract price proportioned to the part taken.[21]

Sec. 14. DESTRUCTION OR DETERIORATION AFTER CONTRACT TO SELL OF THE SUBJECT-MATTER THEREOF. If there is a contract to sell

21. Uniform Sales Act, Sec. 7 (2).

**specific goods and thereafter before title or risk passes to the buyer the goods in whole or in part perish or substantially deteriorate without seller's fault, the seller's obligation is discharged; but the buyer may elect to take the part remaining or the deteriorated goods.**

In the law of contracts we find that a contract may be discharged by impossibility of performance when the impossibility arises by reason of the destruction of the subject matter whose continued existence was an understood or implied term of the contract. Perhaps the most common application of that principle is found in sales of personal property. If one contracts to sell a specific article, but before the time fixed for title to pass it is destroyed without the fault of the seller, he cannot be charged with breach because of his inability to transfer the property. The seller in such a case bears the loss in the sense that it is his article that is destroyed. He cannot take advantage of his contract because he cannot perform his part so as to claim performance by the buyer. But neither can the seller be made to deliver an equivalent article to the buyer. The loss simply lies where it has fallen, that is, on the owner. (We are not yet considering the case where the destruction occurs *after* title has passed. Loss then falls upon the buyer, because he is then the owner.)

It must be noted that what is said here applies only to *specific* ascertained goods, or goods which have since the contract but before title has passed been appropriated to the contract by the seller with the express or implied consent of the buyer. If one agrees by a general description or by sample to sell a quantity of unspecified goods and there-

after the stock or the material is destroyed out of which he expected to perform his contract, but there was no mutual stipulations that the goods should come from such particular stock or material, then there cannot be said to be any destruction of the subject matter of the contract, for the seller may still perform by selecting out of other stock or material, or by going upon the market to buy.

A and B contract for the sale by A to B of A's horse "Ely". After the contract to sell, but before the actual sale has taken place, the horse dies without A's fault. This occurrence terminates the contract between the parties. If the horse had died after title passed, the loss would be B's, even though A still had possession.

A contracts with B to sell 1000 bushels of May wheat. No particular lot of wheat is specified as the subject matter of the sale. A has 1000 bushels on hand. Before the sale takes place this 1000 bushels is destroyed. A is still bound to deliver 1000 bushels of wheat.

What has been said of total destruction is true also in case of part destruction or material deterioration.

Yet the law allows the buyer in such case to take the goods remaining or the deteriorated goods, paying the price therefor he would have paid had the contract been performed, or if the contract is divisible, that is, made up of parts so that the price of the whole is plainly referable to the number of unit parts, then he may have the contract price proportioned to the part taken.[22]

22. Uniform Sales Act, Sec. 8 (2).

## CHAPTER 4

### THE CONTRACT'S OBLIGATIONS AS AFFECTED BY WARRANTIES.

**Sec. 15. DEFINITION OF WARRANTY. A warranty is a part of the contract of sale. It consists in the assertion of some fact concerning the goods put forth to induce the contract and which did induce it and whose truth is regarded by the buyer as essential to the seller's performance of his contract. But if an assertion made by the seller does not so enter into his contract as to become a part thereof it is not a warranty, and its truth is immaterial. Warranties are express or implied.**

When there is a contract of sale, the buyer may make assertions in respect to the goods. He is indeed very prone to do this, for it may be by such assertions that he is able to close the transaction. It is a matter of common knowledge that a seller will "puff his wares." Indeed he may make affirmations without any words spoken. Thus by his very possession of the goods and by the fact that he offers to sell them, he affirms he is the owner of them.

Has the buyer any remedy if these assertions are false? Or does he act entirely at his own risk? Suppose the seller states that the stone he offers to sell is a diamond, and it turns out paste, will the court say that he can return the stone, or have his money back, or his damages? Or what if the seller thought it *was* a diamond—is this material?

The law is that some assertions in respect to

goods sold cannot be broken without penalty because they become a part of the contract, and they become so irrespective of the seller's belief whether they were true or false.

We have then to inquire, what assertions in respect to quality, title, fitness, value, etc., become a part of the contract, and which ones do not.

Generally speaking, we may say that whatever assertion is made for the purpose of being relied upon, and in its nature is worthy of belief, and *is* relied upon, becomes an essential term in the contract of sale, and if false, there is then a breach of contract, for which the buyer has his remedy.

We have already indicated that warranties are express and implied. First, let us consider express warranties, and then those that are implied from the circumstances.

### A. Express Warranties.

**Sec. 16. WHAT CONSTITUTES EXPRESS WARRANTY. "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods nor any statement purporting to be a statement of the seller's opinion only shall be construed a warranty."** [22]

We see from the above language that it is largely a question whether a statement was given and taken as a matter of *fact* or a matter of *opinion* which is decisive whether the assertion is or is not a warranty. It is well settled law that a mere

22. Uniform Sales Act, Sec. 12.

opinion or prediction on the part of the seller is not a warranty, for the plain reason that the buyer ought simply to receive it as such. He may indeed be influenced by it, but, after all, he should know that it may or may not be true. An opinion is but an opinion; it is a matter resting alone in judgment. It may be based upon facts but it does not purport to state a fact. If I say that a horse is sound I state a fact which may be true or false and this therefore constitutes a warranty if relied upon.[23] But if I say that a horse is *considered* sound, or that I believe him to be sound, that is a different matter.[23a] So if I predict a future event, it is a mere opinion. No one can foretell the future. I may say stocks will rise, oil wells will yield, gold mines will pay, and though I be the best judge on earth of those events, still every one must know that I am only giving my opinion. An express warranty, then, must be the statement of a *fact* concerning the goods meant to be relied upon, and which is relied upon. If does not matter that the seller speaks as he believes. He takes it upon himself that the fact is true. It he says a stone is a diamond, his *contract* is that it *is* a diamond, and the buyer is entitled to rely on his statement. And it is not necessary that the parties use the word "warrant" or similar word.

To indulge in words of praise concerning goods is allowable, though such words be extravagant, as long as there is no misstatement of fact. "That horse is the best in the country;" "that dog is the best bird dog a man ever owned;" and similar statements, are considered "dealer's talk."

23. Hobart v. Young, 63 Vermont Reports, 363.
23a. Id.

A buyer must purchase in reliance on the warranty. For this reason a general warranty is not taken to cover obvious and known defects. If a horse is warranted sound, and he has, known to the buyer, a blind eye, the warranty cannot be taken as referring to the eye.[23b] Yet one who has taken a general warranty need not search for defects. He may rely upon his warranty.

**Sec. 17. WHETHER ALLEGED ORAL WARRANTIES PROVABLE IF CONTRACT IN WRITING. If a contract to sell or a sale is completely reduced to writing alleged oral warranties cannot be introduced for the purpose of changing or adding to the contract as it appears in the writing.**

If the contract of sale has been reduced to writing complete upon its face, statements made orally cannot be regarded as constituting warranties and therefore will not be received in evidence, for it is to be considered that the parties meant the writing to be the expression and evidence of their act. But if the writing shows on its face that it was but an incomplete memorandum and was not regarded by the parties as expressing the entire act, then such oral warranties as were really a part of the contract could be proved as though the entire transaction had been oral, unless the statute of frauds was applicable to the particular case (there being no part delivery or payment).

Of course this reasoning has no application to *implied* warranties which exist regardless of the form of contract, except that if the writing covers

23b. McCormick v. Kelly, 28 Minn. 135. (After Kelly had used a harvesting machine and knew its defects he purchased it and claimed a warranty covering those defects. Held, it did not cover them.)

the point, there cannot be an implied warranty upon the same point.

B. Implied Warranties.

**Sec. 18. THE IMPLIED WARRANTIES. (1) THOSE OF TITLE. In every sale or contract to sell there are the implied warranties of title that the seller has, or will have when the title is to pass, an unencumbered ownership in the goods with right to sell them.**

The subject of implied warranties of title is an important one. In some senses one buys personal property at his own risk, that is subject to the right of an unknown owner to claim the goods and assert his ownership even against a person who has bought them from one in whose possession he found them and whom he believed, because of such possession, to be the real owner. There are indeed many cases in which the real and unknown owner cannot do this, yet also many in which he can, and the law for the protection of the buyer implies in every sale the warranty that the seller is the owner and has a right to sell the goods and that no encumbrances exist against them. If, therefore, one purchases goods which he is afterwards compelled to give up to another because of a superior title, or if one is compelled to pay out money to satisfy lawful claims that existed against those goods and because of which the goods could be taken in the hands of the buyer, he has his remedy against his vendor.

**Sec. 19. THE IMPLIED WARRANTIES. (2) THOSE CONTAINED IN A SALE BY DESCRIPTION. When a buyer contracts for goods that shall be of a certain description, there is an implied warranty that goods will be furnished which will meet that description.**

If one orders or purchases goods by stipulating that they shall be of a certain description, the seller must furnish goods as described. And if the order is by way of description that is in effect a stipulation that the goods shall be of that description. We are considering a situation where there is no sale of specific or ascertained goods, but of goods to be supplied according to a description given. If goods are not supplied according to that description, there is a failure to fulfill the contract. Thus if I order "Ceara scrap rubber, second quality", goods conforming to that description must be furnished.[24]

**Sec. 20. THE IMPLIED WARRANTIES. (3) THOSE CONTAINED IN A SALE BY SAMPLE. Where there is a contract to sell or a sale by sample, there is an implied warranty that the bulk shall correspond with the sample in quality. If the seller is a manufacturer of such goods, there is a further warranty that the goods shall be free from any defect, rendering them unmerchantable, which would not be discoverable on reasonable examination of the sample.**

A sale by sample is in effect a sale by description. The sample becomes a term of the contract. The quality of the sample must be the quality of the goods furnished.

If the seller is a manufacturer, and the defect in the sample is not discoverable by ordinary inspection, the existence of such hidden defect in the sample constitutes a breach of warranty, for he must deliver goods of the *apparent* quality of the sample.

Every case in which a part of the bulk is shown,

24. Gould v. Stein et. al., 149 Mass., 570.

or something is supposed to be a representative of the bulk is not a sale by sample. It must be the mutual understanding of the parties that the seller is in effect saying: *the goods are like this.* But if the circumstances are such that it can only be said that the seller was simply giving assistance to the buyer that he might form his own judgment, and there was no representation that the bulk would equal the part shown, as where the bulk was present and might conveniently be examined it is usually held there was no sale by sample.[25] The circumstances must be inquired into. Thus if one is buying a carload of apples which are present and could be conveniently examined by the buyer, and the seller selects an apple at random and remarks that they are good apples there is no warranty that all the apples are like the one shown. In the absence of fraud, the buyer would be bound to take the apples, though not all so good in size or quality. But in an Illinois case the buyer who was lame requested the seller to climb up on the car and show him one of the apples, which the buyer did, remarking that they were all like that, it was held there was a warranty that they should equal the one shown.[26] In cases by sample, the seller must be in effect saying, "the goods are like this sample," and the buyer must rely on that assertion.

25. Bierne v. Dord, 5 New York Reports, 95. "That a personal examination of the bulk . . . is not practicable or convenient, furnishes no sufficient ground, *of itself*, to say that a sale is by sample . . . (such) is doubtless a strong fact in reference to the question of the character of the sale, whether it was or was not made by sample.

26. Hanson v. Busse, 45 Illinois Reports, 496.

**Sec. 21. THE IMPLIED WARRANTIES. (4) THE WARRANTY OF QUALITY THAT GOODS ORDERED BY DESCRIPTION SHALL BE MERCHANTABLE. Where goods are purchased of a manufacturer or grower, or (in some jurisdiction and by the Uniform Sales Act) of one who is merely a dealer in goods of that kind, and there is a reliance on the seller's judgment and skill, there is an implied warranty that the goods are merchantable, that is, salable as goods of that general kind.**

Where the seller is a manufacturer or grower and the buyer had no opportunity to give the goods that reasonable inspection which would have disclosed the defect, there is, unless the facts show a contrary intention, and that the buyer relied on his own judgment, an implied warranty of *merchantability*, that is, that the goods have in them no remarkable or unusual defect but are goods in good condition as goods of that general kind. In some states the warranty extends to sales by those who only deal in as well as to those who manufacture or grow, the goods sold.

Thus A orders "waste silk" from B. B sends silk unsalable under that description. This is a breach by B.

If there was opportunity to make inspection, the buyer is generally held to have no right to complain in reference to defects which such examination should have disclosed; this, of course, in the absence of fraud by the seller. In that case, the rule is: "Let the buyer beware" ("*Caveat emptor*").

**Sec. 22. THE IMPLIED WARRANTIES. (5) THE WARRANTY OF QUALITY THAT GOODS ORDERED FOR A PARTICULAR PURPOSE KNOWN TO THE SELLER SHALL BE FIT FOR THAT PURPOSE.**

**Where goods are purchased for a particular purpose which is expressly or by implication made known to the seller there is an implied warranty that the goods shall be fit for that purpose; unless the buyer preclude in that regard the exercise of the seller's judgment by ordering a known, described and definite article, or purchases by patent or trade name or unless he has opportunity for inspection which should have disclosed the defect.**

"Fitness for particular purpose" may mean same as "merchantability" discussed in the foregoing section. But it may mean more. If one buys goods they must, in the cases stated, be merchantable—which means usually that they must be reasonably fit for the purpose for which they were intended as goods of that kind. But the warranty may go further—that they are fit for the special purpose for which *this* buyer intends them. To make this the case, the seller must be acquainted with the use to which the buyer intends to put them and the contract must show that he undertook to furnish goods fit for that use. The general qualifications stated in the preceding section apply likewise here. Thus, usually and in most states, one who is a dealer would not impliedly warrant for any particular purpose; but the special circumstances might show that he did.

Knowledge of the use to which the goods are to be put may be obtained in either of two ways; (1) from the knowledge which the vendor has concerning the *usual* purpose to which such goods are put by purchasers thereof; (2) from the particular knowledge which the vendor has concerning the special purpose to which such goods are to be put by this particular purchaser. The warranty covering the first case might be called either a warranty

of merchantability or of fitness for particular purpose; the warranty covering the second case is the true warranty of fitness for particular purpose.

Thus, in one case a Lumber Company desired a locomotive engine to do its work. It sent an order to a manufacturer of engines, setting forth with great particularity for what purpose the engine was wanted and the work it must do. The manufacturer provided an engine which was totally inadequate, as its use proved. The Court held that as an engine had been ordered from the seller which would do this particular work, the seller by filling the order had undertaken that it should do such work.[27]

As the basis of warranty is reliance upon the representations by the seller, there can be no warranty where the buyer exercises in that respect his own judgment. Thus if the article is seen and inspected by the buyer and the seller is not in a position to know more of the goods than the buyer has opportunity to know, then there cannot be an implied warranty of merchantability or fitness. The rule of *caveat emptor* applies. So, if the buyer in ordering goods describes a *known and definite* article, he cannot complain if he gets just what he ordered, for the seller has no choice but to furnish the particular thing that was ordered. By such known and definite description of the article, rather than description of the purpose for which he intends it, he precludes any judgment on the part of the seller and shows that he does not rely upon the seller's knowledge or skill to

27. Marbury Lumber Co. v. Stearns Mfg. Co., 32 Kentucky Law Reporter, 739.

furnish him goods for a particular purpose, and in such a case there can be no further warranty of fitness than that it is fit for the purpose to which such goods are usually put by buyers thereof—not the particular purpose to which this buyer intends to put them.[28] The same reasoning applies if goods are purchased in patent or trade name.[29]

Thus suppose that A orders of B a ventilating fan to ventilate a certain room and B agrees to furnish him such a fan. He must provide a fan fit for that purpose. But if A had simply ordered a "No. 17 X-Fan" that being a patent name, or a name by which a known definite article was described B's only liability would be to furnish a good merchantable fan of that description, even though he should know A's purpose in buying the fan, for he would have no right under the contract to furnish anything else.

There may, in such cases, be a warranty of merchantability, that is, that they have no unusual defect, but not of fitness for special purpose, for if goods by such description are ordered, it cannot be a breach to furnish that which corresponds with the description.

If goods are ordered from a *dealer of provisions* for purposes of immediate consumption, there is an implied warranty that they are fit for such consumption: Thus, if one orders meat from a butcher, to use for his own and family's consumption, there is an implied warranty that it is not unwholesome and unfit for use. "It may be said

28. Grand Ave. Hotel Co. v. Wharton, 79 Federal Reports, 43.

29. Peoria, etc., Co. v. Turney, 175 Illinois Reports, 631.

that the rule is a harsh one; but, as a general rule, in the sale of provisions, the vendor has so many more facilities for sale than are possessed by the purchaser, that it is much safer to hold the vendor liable than it would to compel the purchaser to assume the risk."[30] In some states there is no such warranty.

**Sec. 23. WARRANTIES NOT AVAILABLE AGAINST A REMOTE SELLER. A warranty extends only to the immediate buyer. A subpurchaser cannot sue thereon. But he may have an action based on a remote seller's negligence where he has suffered injury as the natural result of such negligence.**

If A sells to B who sells to C, C must look to B, so far as warranty of condition, quality or title is concerned. He cannot sue A. Yet if A is negligent in constructing or composing the article, and C suffers therefrom in a way that A might reasonably have foreseen, C may sue A for damages occasioned by the negligence. What would constitute negligence would depend to some extent on the nature of the articles which one was manufacturing. He must use due care to see that the thing built or manufactured is not likely to cause injury to those into whose use it will probably come in the ordinary course of trade. If he puts up a poison to sell to a druggist for retail trade, he must use care not to label it incorrectly. If he builds a step-ladder he must use care to build it strong enough to support the average person; or that person, if injured, may sue him, if he was one of a class of persons whom A might reasonably have considered to be a purchaser or user of such ladder in course of time.

30. Wiedeman v. Keller, 171 Illinois Reports, 93.

# PART II.

## THE CONTRACT'S EFFECT AS TRANSFERRING TITLE.

## CHAPTER 5.

### TRANSFER OF TITLE BETWEEN BUYER AND SELLER, WHEN RIGHTS OF THIRD PARTIES NOT INVOLVED.

**Sec. 24. MEANING OF PHRASE "TRANSFER OF TITLE."** In every complete sale there is a certain moment of time wherein the ownership of the goods by the seller ceases and that of the buyer begins; therein is the transfer of title. When this shall occur depends upon the intention of the parties as determined by rules of construction. But where the rights of third parties as creditors or purchasers are affected by such sale, the positive law may override and defeat such intention.

Goods which are the subject matter of a sale, must belong at each moment of time to buyer or to seller. There must occur a certain definite moment or occasion wherein it can be said that then the title or property passed, defeasibly or absolutely. The goods must be at any given moment either buyer's or seller's (assuming, of course, that no third party has title). Whether this transition takes place and at what moment, is the subject matter of this present chapter. There is, however, another viewpoint made necessary in cases which concern the rights of third per-

sons. A person other than the seller, may, unknown to the buyer, really own the goods or he may have rights which may be so prejudiced by such sale or attempted sale, that the law permits him to defeat or ignore it in the proper proceedings. The subject of the transition or title as between the buyer and seller is discussed in the present chapter. In the following chapter the rights of third parties in respect to such transition are considered.

**Sec. 25. GOODS UNASCERTAINED. Title to unascertained goods cannot be transferred.**

There may be a contract to sell goods which are at the time wholly unascertained, but the transfer of title cannot take place until the ascertainment.[31] Thus if A undertake to sell B a certain kind of threshing machine out of A's stock of such machines, B does not thereby own any machine until one party has, with the express or implied consent of the other party, selected and appropriated a machine to the contract. Whether title would pass *at* such appropriation depends on other rules. It is true, of course, that before title passes there will be a right to sue for breach of contract. But after title passes there is a right to the *property* in the buyer.

It is a mooted question whether title can pass, even when that is the intention, to a part of a mass of fungible goods like wheat, oil, or wine, where there has been no separation of the part from the whole. One argument is that title cannot pass,

31. McLaughlin v. Piatti, 27 California Reports, 451. The reasoning in Sec. 12 applies here.

because it could not be said what part was owned by the buyer, and in case of a destruction of a part of the mass, whether it was his part or anothers that had been destroyed. But it is really not necessary to determine this. For the buyer may be considered as an *owner in common* with the seller and in case of loss each would sustain his proportionate share and this is the better rule.[32]

It is every where admitted that if the goods contracted for are not fungible goods, that is, the units are not indistinguishable, title cannot pass until ascertained. Thus if 50 out of 100 logs are sold, it is important both to buyer and seller what particular logs shall be selected as each may differ from the others even though as a matter of fact they may be substantially alike and no title passes unless the sale was intended to be an *undivided* interest in the whole mass. But where the sale is of wheat in a warehouse, oil in a tank, etc., it ought to be possible to transfer ownership without separation if the parties so intend and that title may be so transferred is now considered the better rule and in accordance with mercantile demands, but the contrary doctrine prevails in many jurisdictions.[33]

**Sec. 26. GOODS ASCERTAINED. Title to ascertained goods passes according to the intention of the parties.**

So long as the goods are unascertained, title cannot pass. If ascertained, the time at which property in the goods shall pass depends on the question of the parties' intention. The law will

32. Kimberly v. Patchin, 19 New York Reports, 330.
33. Scudder v. Worster, 11 Cushing (Massachusetts), 573.

not declare the buyer to be owner of the goods sooner or later than the parties intended he should become such owner. The difficulty is in discovering such mutual intention. For this purpose the law resorts to certain rules of construction. These rules are not arbitrary or final in nature, but indicate primarily, and unless it otherwise appear, the intention of the parties. These rules are framed according to circumstances as they may be, for it is from such circumstances that the intention must be inferred when the parties do not in words express their intention. In usual cases these rules would constitute the true indicia of intention; for that reason they are established as rules.

**Sec. 27. RULES FOR ASCERTAINING INTENTION OF THE PARTIES: THE FIRST RULE. Unless a different intention appears, "where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed." [34]**

If at the time of contract, the goods are ascertained and are then in a deliverable shape, the presumption is that the title is then to pass, though perhaps credit is given and the goods are not yet delivered. This presumption may be overcome by contrary evidence. Thus A says "I will sell you this horse for $50." B says "I will take him" and it is arranged that B shall come the next day and pay for and get the horse, the presumption is that the horse immediately becomes B's.

34. Uniform Sales Act, Section 19, Rule 1.

**Sec. 28. RULES FOR ASCERTAINING INTENTION OF THE PARTIES. SECOND RULE. Unless a different intention appears "where there is a contract to sell specific goods, and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable shape, the property does not pass until such thing be done." 35**

If goods, though ascertained, are still to be completed, or weighed or measured, to establish the price, or anything is necessary to be done by the seller to put them into deliverable shape, the presumption is that title is not to pass until that thing be done; but the contrary intention may be shown to overcome the presumption. Thus if A orders B to make a wagon for him out of materials owned by B, it is not presumed that title in the wagon shall pass to A until the wagon is completed and ready for delivery even though A sees the wagon from time to time in the course of construction and knows that is the wagon meant for him.

**Sec. 29. RULES FOR ASCERTAINING INTENTION OF THE PARTIES. THIRD RULE. Unless a different intention appears. "(1) When goods are delivered to the buyer 'on sale or return,' or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the present goods instead of paying the price, the property passes to the buyer on delivery, but he may re-vest the property in the seller by returning or tendering the goods within the time fixed in the contract, or if no time has been fixed, within a reasonable time. (2) When goods are delivered to the buyer on approval or on trial or on**

35. Ibid, Section 19, Rule 2.

**satisfaction, or other similar terms, the property therein passes to the buyer (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction, (b) if he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for a return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact."**[36]

The above rule covers those sales wherein title is not finally to pass until the buyer is *satisfied by trial* with the goods. The first paragraph of the rule relates to transactions in which there is an executed contract of sale, but the buyer may cause the title to revest; the second paragraph of the rule relates to transactions in which the buyer has the goods simply "on trial" that he may thereafter accept and purchase them if he so desires. It will be noted that the mere failure to make the return operates to pass the title, or if it has already vested, to make it absolute. The importance of distinguishing between the two transactions lies chiefly in the fact that risk of loss (where there is no negligence involved) follows the title in such cases, and in the fact that the creditors of the owner may seize his goods. These transactions must not be confused with that form of conditional sale in which the title is retained by the seller merely for purposes of security. Thus, if A sells goods to B under an agreement that B may return the goods any time within 30 days if he finds them unsatisfactory, the goods belong to B but he has a right to re-vest the title in A any

36. Uniform Sales Act, Section 19, Rule 3.

time within the 30 days by returning them. When the 30 days have elapsed, B owns the goods absolutely with no right of return so far as this particular agreement is concerned. Until such return within 30 days, the goods are subject to seizure by the creditors of B. Risk of loss is upon B at all times from the time he gets the goods until he makes the return or makes a good tender of return. Or, suppose that B agrees with A that A may send him a washing machine "on trial" for 30 days. Under such circumstances B has not purchased the machine, and title will not pass to B until 30 days have elapsed, unless before the expiration of the 30 days he signifies his intention to take the machine. If B does not return the goods within 30 days, title will pass to him and he cannot thereafter return such machine. During the 30 days (unless B has before the end of the period signified his acceptance) the risk of loss is on A unless the loss occurs by B's negligence.[36a] The creditors of A also could seize the machine—B has no right in the machine against A's creditors because he is under no contract to purchase it. In these cases there is a consent on the part of the recipient to the terms of the delivery. But if A should send B such machine without B's assent, he could not provide that unless B returned the goods within a certain time, he should be considered as having purchased them unless he agrees to this; for that would be forcing a sale on B, or compelling him without his consent to do something to prevent a sale from arising.

36a. Pence v. Carney, 78 Ark. 123; "An option to purchase if he likes is essentially different from an option to return if he should not like."

**SEC. 30. RULES FOR ASCERTAINING THE INTENTION OF THE PARTIES. FOURTH RULE. Unless a different intention appears "(1) where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied and may be given either before or after the appropriation is made. (2) Where in pursuance of a contract to sell, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20. This presumption is applicable although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words collect on delivery or their equivalents."** [37]

Where the goods are unascertained, the title, as has been already noted, cannot pass. Upon ascertainment title passes according to the intention of the parties. Where pursuant to this contract to sell goods at present unascertained, certain goods in a deliverable state are set aside or designated or in any way appropriated to the contract, it is presumed, rebuttally, that the intention of the parties is to pass title upon such appropriation. If the seller pursuant to the contract delivers

37. Uniform Sales Act, Sec. 19, Rule 4. "Section 20" relates to reservation of title. See herein Sec. 32.

goods to a carrier for transportation to the buyer, the delivery is presumed to be an appropriation and title passes then, if it has not passed before. The goods are while in transit the property of the buyer and not of the seller. We shall hereafter notice that if the seller undertakes, as a part of his contract, to make the delivery, title remains in him until such delivery is complete. That, however, means that the seller undertakes to pay the expense of the delivery and assumes the burden of its success. In the ordinary cases where the goods are at the seller's place of business, the seller assumes the task of putting the goods in the possession of a carrier, and such carrier is the agent of the buyer, and the risk of loss is upon the buyer and title has passed.[38]

Even though goods are appropriated to the contract, still so long as there remains something to be done by the seller to put them in a deliverable shape, title has not passed. In cases of shipment made by the seller, title is usually held not to pass until delivery to the carrier though necessarily before that time the goods had to be segregated; this is because where a number of things were to be done by the seller in the process of appropriating unascertained goods, it is presumed the intention of the parties was to defer transition of title until the last act.

Where goods are shipped "Collect on Delivery," this has no effect upon the passing of title. If by the rules discussed where goods are not so shipped title would pass, it will still pass not-

38. Carthage v. Duvall, 202 Illinois Reports, 234.

withstanding such provision that the carrier must collect before delivery.[39] Thus the carrier might be the buyer's agent to transport the goods and the seller's agent to maintain the lien for the price and collect the charges.

**Sec. 31. RULES FOR ASCERTAINING THE INTENTION OF THE PARTIES. FIFTH RULE. Unless a different intention appears "If a contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."**

Delivery to carrier is ordinarily delivery to buyer and if it was understood from the express terms of the contract or from the circumstances that the seller was to deliver to the carrier, the seller would be under the obligation so to do, and having done so, title would thereupon pass. But if the seller takes upon himself the more onerous contract of seeing that the goods reach a certain place, as where he undertakes to pay the freight, title does not pass in such case until the carriage to such place is complete.

In this connection the initials "f. o. b." standing for the words "free on board," are often used, and are of importance in determining the intention. Thus if M. at A., agrees to ship goods to N. at C., "f. o. b." at B, a point intermediate between A and C, title will presumably pass at B. If terms are "f. o. b." at A, or "f. o. b." at C, title

39. Carthage v. Duvall, supra.

will pass in the first case at A, the point of shipment, or in the second case at C, the point of destination. This is but a rule of construction and not final. Evidence may show that the parties meant the title to pass otherwise. Thus, if on final settlement the buyer is to add the cost of shipment to re-imburse the seller, that would seem to indicate that title was to pass on delivery of goods to the carrier.

**Sec. 32. RESERVATION, UPON SHIPMENT, OF TITLE IN SELLER. The seller by the form of his contract with the carrier may reserve title in himself notwithstanding delivery to such carrier.**

If the shipper has the bill of lading made out to himself or his agent, this effects a retention of title in himself. A bill of lading is the evidence of title and by its form may indicate that though the seller made delivery to the carrier, yet he did not by that act finally appropriate the goods to the contract, but intended until a future time to reserve title in himself. This is sometimes referred to as the retention of the *jus disponendi.* One mode of retaining title by means of the bill of lading is to send the bill to some third person, usually a banker, with draft attached, which must be accepted, or, if a sight draft, paid, before the bill of lading can be secured. This reserves title even though the bill of lading names the buyer as consignee.[40]

40. Greenwood Grocery Co. v. Canadian, etc. Co., 72, South Carolina 450. This case contains an excellent consideration of the entire law on this subject.

Bills of lading are made out in two forms: the "straight" bill and the "order" bill. The first form is a bill made to some certain person. The second form is one made to the order of a certain person, or to a certain person or his order. By statute in some states and by an order of the Interstate Commerce Commission, straight bills of lading are made non-negotiable; order bills are made negotiable, and where such distinction prevails the carrier is not protected in delivering the goods where an "order" form was used except upon presentment of the bill of lading properly endorsed; otherwise it is. To insure a valid retention of title, the shipper should therefore use the order form of bill of lading, unless he makes himself the consignee.

Sec. 33. **RISK OF LOSS. Unless there is an agreement to the contrary risk of loss attends the title.**

The risk of loss is usually upon the owner. The parties might indeed agree otherwise, but that is seldom done. This statement of risk does not include cases of loss on account of negligence of a seller or buyer having possession and not title. If title has passed while goods are in possession of the seller or his agent in that behalf, the seller would then be a bailee of the goods and liable as such to use due care for their safety. Assuming there is no question of negligence, it is almost always true that risk follows the title. Indeed the important reason in many cases for raising the question of transition of title is to decide upon whom the loss must fall.

If, then, a specific article has been bought and title has really passed, the loss is on the buyer re-

gardless of the fact that he may never have had possession. Thus, if pursuant to a contract of sale goods are shipped to A under such circumstances that title passed upon delivery to the carrier, the loss as between buyer and seller, is upon the buyer, but if by shipment "f. o. b." destination, or by retention of title by bill of lading, title is still in the shipper, then loss is upon him as between him and the buyer. In these cases, whether there is any recourse against the carrier is a different question and would depend on the nature of the cause of loss and the contract with the carrier.

There is a seeming exception to the rule that risk attends the title in contracts of conditional sales in which the seller, though giving possession to the buyer, retains title for purposes of security in himself. In most states the cases hold that risk is upon the buyer in possession. He is for practical purposes the owner. The reservation of title is merely for purposes of security and has the same purpose as though the buyer had taken title and given back a chattel mortgage. In such a case the loss would be on the mortgagor. The same rule should apply here, and it is accordingly so held. Therefore in case of loss the buyer cannot have back what he has paid, has no claim against the seller to replace the article, and must pay the balance due upon the contract.[41]

41. Burnley v. Tufts, 66 Mississippi Reports, 48.

## CHAPTER 6.

### TRANSFER OF TITLE WHEN RIGHTS OF OTHERS THAN BUYER AND SELLER INVOLVED.

**Sec. 34. ATTEMPTED SALE BY ONE NOT OWNER: IN GENERAL. If goods are sold by one not the owner thereof, no title is acquired by the purchaser unless the real owner is estopped to assert his own title.**

One cannot sell goods that he does not own unless he is aided therein by some act of the real owner which estops the owner to assert his ownership or deny the seller's authority or title. It is true that one who acquires negotiable paper in due course may often take a better title than his transferor had. So one who gives value for money may acquire good title thereto even from a thief but goods are not subject to these considerations. Except for the estoppel of the owner, the buyer can take no better title than his vendor had, and the true owner may retake the goods as his own. In which case the purchaser must be content with the warranties of title implied in the sale. For breach of these he may have his damages.

#### A. When True Owner Not Estopped to Assert Title.

**Sec. 35. IN GENERAL. Against third persons an owner of goods by merely investing another with their possession for a lawful purpose is not thereby estopped to assert his title against any one claiming under the possessor's title.**

The owner loses no rights to assert his title by merely clothing another with possession. There must be some additional element. It is true that by reason of such possession, the possessor may be enabled to deceive his creditors or purchasers as to his ownership. He may seem to have more assets than he really has. Yet the exigencies and conveniences of commercial life override this consideration and it is well settled everywhere that the true owner may still assert his rights. As illustrating this principle the following particular instances are cited.

**Sec. 36. IN CASE OF CONSIGNMENT FOR SALE. A mere consignment of goods to be sold by consignee for the benefit of the consignor gives the creditors of such consignee no rights against such goods.**

It is a usual practice among merchants for a wholesaler to consign goods to a retailer, that is, to send the goods to the consignee as agent to sell them. This must be strictly distinguished from a sale on credit. In a sale on credit the buyer owns the goods and the seller has parted with his title in return for the buyer's promise. One who *purchases* from a consignee gets of course a good title, for that is the purpose of and the authority conferred by the consignment, but a creditor gets no rights even though he may have allowed the credit in reliance upon the apparent value of the assets conferred by the possession of such consigned goods. Therefore, such goods cannot be seized for the debts of the consignee, and may be reclaimed from the trustee in bankruptcy.

**Sec. 37. IN CASE OF BAILMENT OTHER THAN FOR SALE. Conferring mere possession upon an agent**

**or bailee for purposes other than those of sale gives neither creditors of such consignee nor purchasers from him any rights against such goods.[42]**

Whether an agent is entirely within one's employ upon salary or commission or is specially employed for a particular purpose it may be necessary or desirable to supply him with goods whereby he may accomplish his agency or perform the terms of the contract. In such a case the owner may assert his title against any one claiming under or against such agent or bailee. In such a case it is to be remembered, there must be a true case of bailment. The possessor must be obliged to return the same goods in their present or an altered form, for otherwise the possessor as purchaser has a title he may convey.

Even though the party with whom possession was placed is a dealer in such goods, still if no authority were given him to sell he could give no valid title. Thus a jeweller, having a watch left with him for repairs could not give good title to it. The owner could take it from the buyer.[43]

### B. When True Owner Estopped to Assert Title Against Third Persons.

**Sec. 38. IN GENERAL. Where other than by mere possession the owner authorizes or permits another to deal with the goods as his own, he may be estopped to assert his ownership as to one who has dealt with the possessor as the owner.**

42. Fawcett v. Osborne, 32 Illinois Reports, 411.
43. Biggs v. Evans (1894), 1 Q. B. 88.

Having now considered the cases in which the true owner may assert his title against creditors and purchasers of another, let us consider the cases in which a true owner will not be permitted to set up his title, as against those who have dealt with another as the owner of the property. There are two well defined classes of cases.

**Sec. 39. ALLOWING ANOTHER TO ASSERT THAT HE IS OWNER. Where the true owner of goods allows another to make statements and representations of ownership the true owner cannot assert title against third persons acting on the faith of such representations and statements.**

In this case there might or might not be actual fraud. But in either event, the true owner could not assert his title. It would have to be apparent of course that the true owner *permitted* the representations—stood by and did not deny them, or aided the agent in making them. Thus if one should put goods in the hands of another and tell that other to put his own name upon them, and to keep the fact of the real ownership secret by making representations of his own ownership—that would estop the owner. The one in possession could give a good title.[44]

**Sec. 40. CLOTHING ANOTHER WITH DOCUMENTARY INDICIA OF TITLE. When the true owner of goods allows another to hold documents of title made out in his own name, registration in his own name, etc., this is clothing the other with such indicia of**

44. O'Connor v. Clarke, 170 Pennsylvania Reports, 318.

**title that the true owner cannot assert his title against third persons acting on the faith of the apparent ownership.**

Let us now suppose the case in which the owner, besides conferring possession, also permits the possessor to hold documents of title in his own name, that is, bills of lading, warehouse receipts, etc. In such a case, the true owner is estopped to set up his title against those who deal with the holder of such documents as the apparent owner, and creditors can seize such goods to satisfy their claims.

### C. When True Owner Prevented by Statute from Asserting Title.

**Sec. 41. IN GENERAL. The law may prevent an owner from asserting his title; and statutes are in force in respect to (1) sales in which the seller retains possession; (2) conditional sales; (3) bulk sales of entire stock in trade; (4) mortgages and pledges by factors; (5) chattel mortgages.**

The different states have passed various laws for the protection of creditors and purchasers, providing that such parties may ignore the real ownership in various cases, or may ignore it in such cases unless the rights of the true owner are put on record where they may be known by all men. The chief of these are below briefly considered.

**Sec. 42. EFFECT OF RETENTION BY SELLER AFTER SALE. If after a sale of goods, absolute in**

45. Calais Steamboat Co. v. Scudder, 2 Black (U. S.), 372.

**form, the seller continues in their possession, this is treated, in some states as in itself constructive fraud, rendering the sale void as to creditors or purchasers from the seller and in others as evidence of fraud, subject to rebuttal.**

It has long been settled law that the retention by the vendor of goods sold in an absolute sale is at least evidence of fraud, and in some jurisdictions it is held to constitute fraud, *per se*, no matter how innocent might have been the intention of the parties; this, of course, not as between the parties themselves, but as to creditors of the vendor, and purchasers from him of the goods formerly sold.[46] The buyer who allowed such retention could not assert title as against the creditors of the seller or anyone to whom he had resold such goods. A qualification has been made that if the contract in terms provides for such retention and there is no actual fraud, the case is taken out of the rule. But in such a case the clause must be for some honest purpose and not merely to avoid the rule, and if for purposes of security, would usually have to be recorded, being in effect a chattel mortgage.

Delivery need not consist in *removal*. If, for example, one buys a stock of goods, he may take

46. "And therefore reader when any gift shall be made to you in satisfaction of a debt, by one who is indebted to others also, 1st let it be made in a public manner, and before the neighbors, and not in private, for secrecy is a mark of fraud; * * * immediately after the gifts, take the possession of them; for continuance of the possession in the donor is a sign of trust." Twyne's Case (1602), 3 Coke, 80b under Statute 13 Elizabeth, c. 5., for the avoiding of "feigned, covinous and fraudulent sales."

possession by merely assuming control. It is a sufficient change of possession if the acts of control are of an outward, exclusive character, sufficient to notify observers that a change has taken place. There may still be a change of possession though the seller's employees are retained by the buyer. What amounts to change of possession is a question of fact. If the article purchased is of a cumbersome character, not subject to immediate and easy removal, and constructive delivery is made, as by delivery of keys, that will for a reasonable time be sufficient.[47]

**Sec. 43. CONDITIONAL SALES. A conditional sale of goods wherein the seller retains title for purposes of security in most jurisdictions must be recorded or the condition is void as to innocent purchasers and creditors. Otherwise in most, but not all of the states, the owner of the goods may assert his title against such purchasers and creditors.**

47. In the following states retention is considered as prima facie evidence of fraud, rebuttable by evidence that the sale was actually for value and in good faith. Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Virginia, West Virginia, Wisconsin.

In the following states retention of possession is conclusively presumed to be fraud. California, Colorado, Connecticut, Idaho, Illinois, Iowa (unless recorded) Kentucky, Maine, Maryland (unless recorded), Massachusetts, Missouri, Montana, Nevada, Oklahoma, Pennsylvania, South Dakota, Utah, Vermont, Washington (unless recorded). In Mexico and Wyoming not clearly established.

By the Sales Act (Sections 25 and 26) a seller who is allowed to continue in the possession of the goods sold may give a good title to a vendee as though having express authority to sell them and creditors have much the same rights that they now have in such states.

In most states prior to the passage of recording laws covering that subject a conditional sale of goods deprived the seller of no rights to assert his title against purchasers and creditors of the purchaser until by the performance of the condition the buyer acquired his title. This law has become modified in most states by the recording laws requiring such transactions to be recorded just as chattel mortgages must be recorded.[48] But in some states such transactions though good between the parties, estop the seller to assert his title against the creditors or purchasers of the purchaser. Unless the recording laws in such states comprehend within their terms a conditional sale, even recording will not help and the only safe device is a chattel mortgage.

If a contract of conditional sale is called a "lease" or by any other name, the courts will regard its true intent rather than its mere form.[49]

**Sec. 44. BULK SALES OF ENTIRE STOCK IN TRADE. Bulk sales by a dealer of his stock in trade are forbidden by statute in some states unless there is a certain notice given to creditors, or recordation, or both.**

48. In the following states, one who sells by conditional sale may protect himself by recording the contract: Alabama, Arizona, Colorado, Connecticut, Florida, Georgia, Iowa, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. If recording laws do not cover conditional sales, recording them is a nullity. Gilbert v. National Cash Register Co., 176 Ill. 288.

49. Murch v. Wright, 46 Illinois Reports, 487.

Frauds upon creditors are often perpetrated by means of a sale of the entire stock in trade of a tradesman to one who has actual or constructive notice of the fraud or who may even be in connivance and not actually a purchaser, and statutes in some states have been passed providing that bulk sales shall not be good except upon notice to creditors, or upon recording the transaction, or both.[50]

**Sec. 45. TRANSFERS AND PLEDGES BY FACTORS. Factors' acts have been passed in a number of states to protect those who deal with factors and consignees to the amount of their advances.**

A factor is one to whom is given the possession of goods to sell them for the owner. He is more popularly referred to as a commission merchant. His authority is very large and he often deals with respect to such goods in his own name. But he has no authority to pledge such goods for his own debts, even though such pledgee deal with him under the assumption that he is the owner. Statutes in a number of states have been passed to protect pledgees, lienors and purchasers to the extent of their advances. These factor's acts

50. Bulk sales laws are in force in Alabama, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

differ in their provisions to some extent, but they are all for the purpose of protecting parties dealing with a factor to whom goods have been entrusted.[51]

**Sec. 46. CHATTEL MORTGAGES. One who buys chattels or acquires any lien upon them is protected against a prior mortgagee of such chattels unless such mortgage has been duly recorded or possession has been taken by the mortgagee.**

In all the states a chattel mortgagee is not protected against subsequent parties dealing with the owner of the goods unless he either takes possession or records the mortgage.

51. Factor's Acts have been passed in Maine, Maryland, Massachusetts, New York, Ohio, Pennsylvania, Rhode Island and Wisconsin.

## CHAPTER 7.

### TRANSFERRING TITLE BY TRANSFERRING THE DOCUMENT OF TITLE.

**Sec. 47. WHAT ARE DOCUMENTS OF TITLE. A document of title may be stated to be any document in which the possessor of goods states the right of the holder of such document, or his transferee or endorsee to receive the goods therein described.**

The ordinary documents of title which figure to any extent in the commercial world are bills of lading and warehouse receipts. By documents of title we mean a paper which may be taken as a representative of the goods themselves inasmuch as it is the evidence of the title to the goods.

**Sec. 48. DOCUMENTS OF TITLE EITHER NEGOTIABLE OR NON-NEGOTIABLE. Documents of title are assignable and not negotiable except where some law has been passed to make them negotiable. Such laws provide that documents of title may be either negotiable or non-negotiable according to their form.**

In many of the states documents of title are all simply assignable, not negotiable. But by the Uniform Bills of Lading Act, and the Uniform Warehouse Receipt Act, adopted in many states,[51a] a warehouse receipt or a bill of lading may be issued as a non-negotiable or as a negotiable

51a. See page 137.

instrument. So an order of the Interstate Commerce Commission is to the same effect in respect to bills of lading. If drawn that the goods are deliverable to "bearer" or to some one or his order, that is, either to order or to bearer, such instruments are negotiable; if drawn deliverable to a certain named person they are not negotiable, although assignable. The Uniform Acts usually provide that they shall be considered negotiable if drawn in the form of a negotiable document, even though stated to be or stamped "non-negotiable."

**Sec. 49. DISTINCTION IN LEGAL EFFECT BETWEEN NEGOTIABLE AND NON-NEGOTIABLE DOCUMENTS OF TITLE. If a document is negotiable it passes with greater freedom from hand to hand chiefly by reason of the fact that the transferee thereof does not need to notify the bailee of his acquisition of title, while a transferee of a merely assignable document acquires no rights against the bailee except upon notice; and by the fact that the holder of a negotiable document is not subject to some defenses otherwise good.**

While we say that an instrument of title is negotiable, it is not negotiable in the same sense that a bill of exchange, check or promissory note is negotiable. Those instruments call for the payment of *money* and not any particular pieces of money, while a bill of lading calls not only for goods but particular goods, in which some person may have a title which is not apparent, as where for instance they have been stolen from him. Negotiable bills, notes and checks comprise the Law of Negotiable Instruments, which sets forth a

great variety of rules governing promises or orders to pay money, such as those that relate to presentment for payment at maturity, notice of dishonor and protest, and many others which in no way relate to a negotiable document of title. When we say that a document of title is negotiable we do not attempt thereby to classify it with bills of exchange, checks and promissory notes, or make it subject to the peculiar law that governs negotiable instruments, except to a limited extent.

If a carrier issues a bill of lading or a warehouse receipt which is negotiable in form, then the warehouseman or carrier must know that that document may be negotiated and consequently the goods must not be delivered up except on the production of the bill of lading or receipt; but if the bailee issues a non-negotiable bill of lading or receipt, he is not bound to presume that the instrument will be transferred and therefore may deliver the goods to the party therein named without his production of the bill of lading or receipt unless the bailee has been notified of its transfer.

A transferee of a negotiable bill of lading or receipt also obtains the title, if any, which the party had from whom he acquired the instrument although that party transferred it in breach of trust, or had himself acquired it by fraud or duress.

In these two important ways, and in some others, a negotiable document of title differs from a non-negotiable one.

It is to be remembered, however, that in many states such laws dividing documents of title into two parts are not in force, and in such case such documents are assignable to transfer the title of the goods, but are not negotiable.

**Sec. 50. HOW NEGOTIATION OF DOCUMENTS ACCOMPLISHED. A negotiable document is transferable by delivery when it runs to bearer, and by indorsement when it runs to the order of a certain person. If indorsed in blank it then becomes payable to bearer.**

If the document runs to bearer it may pass from hand to hand without endorsement; if to a person's order, then it must be endorsed by him to transfer title. He may endorse it in blank, that is, by simply writing his name; or specially, that is, to a certain person over his signature. If he endorses in blank, this permits its further negotiation by mere delivery; if he endorses it specially it can only be negotiated by endorsement.

**Sec. 51. RESULTS OF TRANSFER OF DOCUMENT TO TRANSFER TITLE TO GOODS. When a negotiable or non-negotiable document of title is transferred in due form, it accomplishes the transfer of title to the goods. It is a symbolical delivery and title thereupon vests in the transferee.**

A document of title is a symbol of the goods. When it is transferred in proper form, the title passes. The goods then become the goods of the transferee. We have seen that notice to the carrier, warehouseman or other bailee must be given in order to protect the transferee's rights and protect him against the future acts of the transferor. But in negotiable documents this is unnecessary, and in non-negotiable documents, it is unnecessary as between transferor and transferee.

# PART III.

## THE PERFORMANCE OF THE CONTRACT.

## CHAPTER 8.

### OBLIGATIONS OF THE PARTIES.

**Sec. 52. IN GENERAL. The obligations of the parties, being contractual in nature, are governed by the general law of contracts. Each in accordance with his contract is bound to perform, unless by some act or failure to act on the part of the other his obligation is discharged and his performance excused.**

The obligation of the seller is to furnish the goods, as agreed upon, the buyer to pay therefor. Yet the performance of each will be conditioned upon the performance of the other according to the terms of the contract. The seller may be bound to deliver the goods on credit, or if it is a cash sale, he need not deliver at all, but only make tender, unless he receives the price. So, if the seller is to deliver at a place, he cannot perform by making delivery or tender elsewhere unless the buyer waives that obligation. Certain particular obligations are briefly noted.[51a]

**Sec. 53. OBLIGATIONS IN RESPECT TO TIME. A contract of sale must be performed within the time stated, unless strict compliance is waived by the other party.**

51a. See Chapter VIII for effect of acceptance as waiver of rights of purchaser.

Time is of the essence of a contract of sale. If no time is stated, a reasonable time is implied. If a time is stated performance must be made or tendered within that time. But the strict terms of the contract may of course be waived by the other party.

**Sec. 54. OBLIGATION IN RESPECT TO PLACE. Stipulations as to place are material in a contract of sale, and performance must be tendered at such place, unless strict compliance is waived.**

Each party must perform at the place agreed upon. If goods are at a distance from the buyer, and are to be furnished later or upon order, it is usually implied that the seller is to deliver them to a carrier. The carrier is thus made the agent of the buyer rather than the agent of the seller and, as has been seen, title then passes and the risk during transportation is upon the buyer. It requires a special undertaking on the part of the seller to make him liable to deliver to the buyer's place of business in the sense that the carrier is his agent. Where the buyer is at the place where the goods are located and there is no agreement to the contrary expressed or implied from custom or otherwise, the seller is under no obligation to deliver.

**Sec. 55. OBLIGATION IN RESPECT TO QUANTITY. The seller is bound to deliver the amount purchased and the buyer must accept that amount. The buyer need not accept either a larger or smaller amount. If a smaller amount is received he is bound to pay for it at the contract rate, subject, however, to his damages, if any.**

Stipulation as to quantity is of course very material, and the performance tendered by either party must be according to the quantity agreed upon. The buyer need not accept a smaller amount than he purchased. If he does so he must pay for such goods at the contract rate, subject to his damages sustained.

So a buyer need not accept a *larger* amount than ordered. If he chooses he may take from such larger amount, the right amount. But he need not do this. If the excess is only by way of good measure, this would give the buyer no rights of rejection.

Where a contract is made to sell a certain quantity of goods as for instance, 40,000 tons of coal; and the quantity is recited with the qualifying words "more or less" or "about" or of equivalent meaning the recital of quantity is material and such qualifying words provide for merely slight variations.

Where a contract is made to sell certain specific indentified goods and the quantity is recited with qualifying words "about" or "more or less" or of equivalent meaning, the recital of quantity is by way of identification or description and not material in the absence of bad faith. Thus if one should sell all the corn then standing unharvested in a certain field "being about 10,000 bushels" and there were actually only 7,500 bushels, both parties would be bound, the recited quantity being a mere estimate.

It is not requisite in contracts to sell that any certain amount be ordered. It need only be capable of reduction to certainty. But there must be in a contract to sell that mutuality of all contracts. One cannot be bound unless the other is bound.

Therefore an agreement by one to sell at a certain price all such goods as another *may desire*, is not a contract at all. It may be an offer which the other may accept until withdrawn; but it may be withdrawn at any time. On the other hand a promise by one to sell and another to buy all that the buyer *may require during a certain period* is good, even though it cannot be absolutely stated that the buyer will require *any* such goods during that season; for the buyer has foregone his right to purchase elsewhere and this constitutes the consideration for the seller's promise.

Where the quantity is to be delivered in *installments*, very difficult questions in respect to performance often arise. If the first installment is not delivered at all or in an insufficient amount, has the buyer a right to regard the contract as broken and himself discharged from further performance? Where goods are to be shipped in installments, this may amount to several contracts, or it may be one contract whose performance is divisible. This depends on the facts of each case. Concerning this subject, the text of the Uniform Sales Act is as follows:

"Section 45 (1) Unless otherwise agreed the buyer of goods is not bound to accept delivery thereof by installments.

(2) When there is a contract to sell goods to be delivered by stated installments which are to be separately paid for, and the seller makes defective deliveries in respect of one or more installments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the

injured party in refusing to proceed further and sue for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken."

This is one of the difficult questions in the law of sales. It may be said that the fact that goods are deliverable in installments does not make the contract a severable one, and therefore a breach in respect to one installment may amount to a breach of the entire contract; and further it may be said that in any sale for deliveries by installment, a *deliberate* refusal to deliver the first installments justifies a belief on the part of the buyer that there is to be a breach in respect to later installments, and he may act accordingly. But beyond this, we can only say, in the words of the Sales Act, "it depends in each case on the terms of the contract and the circumstances of the case."

## CHAPTER 9.

### ACCEPTANCE BY BUYER; ITS EFFECT.

**Sec. 56. EFFECT OF ACCEPTANCE BY BUYER WHERE SELLER HAS DELAYED PERFORMANCE. Where the buyer accepts goods that arrive late, that does not in itself bar his right to damages for the delay, yet in particular cases, such acceptance might show a waiver.**

If goods arrive late the buyer may usually accept them and still claim damages for the delay. His acceptance will not in itself amount to a waiver of his right to his damages if by such delay he has sustained any.[52] Yet the evidence in a particular case might show a waiver; as where, knowing all the facts he had voluntarily paid the full price; or, where he had made no protest or objection.

**Sec. 57. EFFECT OF ACCEPTANCE WHERE SELLER HAS NOT FULFILLED HIS WARRANTIES OF QUALITY OR FITNESS. Where the buyer accepts goods inferior in quality to those he ordered, that does not in itself bar his right to claim damages for the breach, though if he accepts them with full knowledge, that will bar his right to have rescission of the contract.**

If there is an *express* warranty of quality or fitness it is everywhere agreed that a mere acceptance in itself does not waive the right to

52. Redlands Orange Grower's Association v. Gorman, 161 Missouri, 203.

have damages for the breach. In case of *implied* warranty, there is some difference of opinion. The cases where one inspects goods and then accepts them, knowing just what he has bought, are confused with those in which one has ordered goods for a certain purpose or by a certain description. In such a case the mere acceptance ought not to bar him. To hold that he must reject them in order to maintain his warranty would operate not only unjustly upon him but also upon the seller. If the case is such that a warranty might fitly be implied according to the rules heretofore laid down, mere acceptance, without more, ought not to bar the buyer of the right to have damages. Yet in a few states it is so held; but in most states the mere acceptance alone will not necessarily amount to a waiver. The circumstances of each case are to be studied. Thus in one case a buyer bought, by description, a quantity of ice to be shipped from a distance. There was the implied warranty that it should be merchantable. It was, however, a very poor quality. The buyer received the ice and sold it. But he claimed damages. It was insisted that by receiving the ice he had waived any breach there might have been. But the Court found that there had been immediate protest made, and that the immediate sale of the ice by the buyer was for the best interests of all, as it could neither have been sent back nor stored without great loss. The Court held that under the circumstances the buyer could have his damages.

See, in connection with this chapter, Sec. 62, post, upon the subject of remedies in case of breach of warranty.

# PART IV.

## REMEDIES FOR BREACH.

## CHAPTER 10.

### RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

**Sec. 58. UNPAID SELLER'S LIEN. Though in a contract of sale, title has passed to the buyer, the seller may, unless the sale was upon credit, retain the goods in his possession until payment tendered. This lien is lost by voluntarily parting with the goods and cannot thereafter be reasserted.**

If a contract of sale is not on credit the seller need not let the goods go until he has received his pay. This right to hold the goods is called an unpaid seller's lien. Like all common law liens, it is lost upon delivery of the goods. Thereafter the seller would have no more rights against the goods (unless he had preserved it by mortgage or other special contract) than any other creditor. This common law lien must not be confused with other liens given by statute in special cases, as for instance a mechanic's lien on goods used for the improvement and becoming a part of real estate, where by statute, a lien is given notwithstanding delivery. Where part of goods is delivered, the lien may attach to the remainder for all the price, unless the circumstances show that the seller meant to waive the lien.

**Sec. 59. RIGHT OF STOPPAGE IN TRANSITU. Though, in a contract of sale, title has passed to the buyer, and the goods have been delivered to the carrier for transit, the seller may in case the buyer becomes insolvent during such transit, stop the goods and repossess them.**

Though it has been noted, the carrier is the agent of the buyer except where specially agreed otherwise, and therefore delivery to such carrier is delivery to the buyer, and property passes, yet the common law has extended the lien of a seller to the goods during transit in case the buyer becomes insolvent; not otherwise.

The right ceases when the transit is ended and the carrier has made delivery to the buyer.

The right is exercised by notifying the carrier of the insolvency and requesting it to hold the goods. The carrier then will deliver the goods to the buyer at its peril.

If before the exercise of the right the buyer has sold the goods by a transfer of the bill of lading, the right of stoppage cannot be asserted against the innocent purchaser.

**Sec. 60. RIGHT OF RESALE AND RESCISSION. Where the goods are of a perishable nature or where the goods are unpaid for for an unreasonable time, the seller in possession may rescind the contract and thereby revest the title in himself or make resale to another. In such case the buyer must still respond in damages in so far as the seller has actually sustained them.**

The seller in possession by right of the lien described in section 58 may if he choose, re-acquire

his title if the buyer delays an unreasonable time in carrying out his contract. This he need not do, but may refuse to consider the goods as his own and may store them at the buyer's risk and sue for the entire contract price. But good faith requires that he do not unreasonably imperil the goods, or, if he sells them, get as much as he can. The law holds him to the exercise of good faith. If he sells the goods for less than the original buyer had contracted to give for them he may sue for the deficiency and for such other proper damages which he has sustained.

## CHAPTER 11.

### RIGHT OF RESCISSION BY BUYER.

**Sec. 61. IN CASES OF FRAUD, ETC. If a sale was induced by fraud, misrepresentations or duress on the part of the seller, the buyer may rescind by acting timely and putting, so far as possible, the other party in statu quo.**

By the general law of contracts one who has been induced to enter into a contract, by reason of the fraud, misrepresentations, or duress, on the part of another, may upon discovering such elements and by acting within a reasonable time, have the contract rescinded and the original positions of the parties restored, so far as may be. This principle has frequent application in the law of sales. If the seller secures the bargain through fraud, misrepresentation or duress, the buyer need not abide by the transaction, but may have it rescinded.

Fraud for which there may be rescission consists in the statement of a fact known to be false, made for the purpose of being relied upon and which was relied upon by the buyer. A warranty is an assertion constituting a part of the contract which the seller may or may not know to be false. Fraud arises out of statements made which are known to be false or which are made recklessly without regard to whether they are true or false.

Mere silence on the part of the vendor may amount to fraud. If he knows of a defect, not

apparent to the buyer on reasonable inspection, and fails to disclose it, this will constitute fraud. But as to defects, discoverable upon reasonable inspection, the maxim, in the absence of warranty is "*Caveat emptor.*"

A mere opinion, as it does not constitute a warranty, does not constitute a fraudulent statement which will give any right of action or rescission. Here the same reasoning governs which governs in the case of warranties. That which is expressed by way of opinion should be received as such. If one chooses to act upon it, he acts at his peril.

Where one seeks to rescind a contract on the ground of fraud he must as far as possible offer to put the other party in the original position. He cannot accept and retain the benefits of a voidable transaction and still refuse to be bound upon it. In contracts we note that every voidable transaction becomes binding upon ratification, and receiving and retaining benefits is one of the most common manners of accomplishing ratification. If, however, by reason of the perishable nature of goods or their use before the fraud was discovered, there cannot be a tender of them, the buyer could still refuse to be bound.

Rescission might be accomplished in or out of the courts according to circumstances. If one has not yet received the goods, he could simply refuse to receive them, and, if sued, could aver the fraud by way of defense. If the sale, however, were executed, he might have to seek his remedy in the courts in an appropriate action.

One who seeks rescission must always act promptly and in a definite manner. Unexplained delay will amount to ratification.

**Sec. 62. IN CASE OF BREACH OF WARRANTY. If an express warranty is broken, a buyer may either reject the goods and sue for breach of contract, or may accept and keep the goods and sue for breach of warranty; except that, in a few states, if title has passed the buyer cannot reject the goods, but can only sue for breach of warranty. If an implied warranty is broken, a buyer may in most states, either reject the goods and sue for breach of contract, or keep the goods and sue for breach of warranty; except that in a few states, he waives his right to insist on a warranty where he accepts goods whose defect is discoverable upon reasonable inspection.**

In a few states, if there is an express warranty and title has passed, the buyer must keep the goods, and rely upon his warranty, suing for such damages as its breach may have caused. Also, we have noted that in some states, a breach of implied warranty is waived where goods are received whose defect is discoverable upon reasonable inspection. But in all states, where title has not passed, one is not bound to receive goods or keep them where either an express or implied warranty has been broken. One need not receive that which is different from that which his contract calls for. But, if he chooses he may receive or keep the goods and sue for breach of warranty. After he has received the goods, knowing the facts, or has upon full information elected to keep goods, he cannot afterwards choose to reject them. He must, also, make his election within a reasonable time. Acts done by him inconsistent with an election to return them, will amount to an election to retain them.

## CHAPTER 12

### JUDICIAL REMEDIES OF BUYER AND SELLER FOR BREACH.

**Sec. 63. RIGHTS OF BUYER WHERE TITLE HAS PASSED. If title has passed, and time for delivery has occurred, the buyer, not being in default himself, may obtain the goods from the seller by replevin, or may sue for their value in an action of trover.**

We have found that title may pass before the goods are delivered. Presume, then, a case in which that is true, and that the seller has no lien upon the goods, and no right for any purpose to retain them, yet does so. In that case the buyer may obtain his goods from such person in the same way that he could from any one wrongfully holding them. He may bring replevin, which is a form of action whereby one obtains possession of his goods wrongfully withheld by another. Or, he might give up his right to the goods and have damages for their conversion.

**Sec. 64. RIGHTS OF BUYER WHERE TITLE HAS NOT PASSED. If the title has not been passed, the buyer, not being in default may maintain an action for damages. He cannot compel delivery of the goods unless they have to him a peculiar or rare value, so that a judgment for damages would not adequately compensate him. In that case a court of equitable powers would compel the seller to transfer the very goods contracted for.**

Where title has not passed, the buyer has usually only his action for damages for breach of contract. A agrees to sell B a certain wagon, but never carries out his contract. As B on account of the default on A's part never became the owner of the wagon he cannot claim it, but his remedy is by way of suit for damages which he has suffered.

In unusual cases a court of equity will compel the transfer of the thing contracted for. In such a case the goods must have a rare and peculiar value so that it would be hard if not impossible to arrive at any definite measure of damages. In the ordinary commercial transactions this would not be so.

**Sec. 65. RIGHTS OF SELLER. If title has passed the seller may enforce his lien, his right of resale and rescission, as noted above, and also have an action for such damages as the exercise of such rights fail to yield compensation for, or he may refuse to exercise any of such rights, and depend entirely on his action for damages. If title has not passed he may have such damages as he has actually sustained.**

Various remedies of the seller, exercisable by him without court aid were heretofore discussed. In addition to these, or entirely in lieu thereof the seller has his action for damages. If title has passed, the seller cannot be forced to retake it again if he do not desire, nor need he rely upon his lien. He may waive these and sue; this however is qualified by the proposition that he must always use good faith. Thus if goods were perishable, he could not let them decay, when he might by the exercise of ordinary diligence sell them. If title has not passed, the value of goods, if any, to the seller, must be deducted from his damages.

# APPENDIX A.

## UNIFORM SALES ACT.

(NOTE: The following Act was recently drafted by the Commissioners on Uniform State Laws, and recommended for passage by the different states. It does not seek in any substantial way to change existing law, but purports to gather into one code the Law of Sales, changing the law in some states in some respects where such states had adopted a view rejected by the commissioners in their choice between opposing doctrines. It has been adopted so far in Arizona, Connecticut, Maryland, Massachusetts, New Jersey, New York, Ohio, Rhode Island, Wisconsin.)

# APPENDIX A.

## UNIFORM SALES ACT.

(For states in which this law is substantially enacted, see page 95, note.)

### Formation of the Contract.

Secs.

1. Contracts to sell and sales.
2. Capacity—liabilities for necessaries.
3–4. Formalities of the contract.
5–8. Subject-matter of the contract.
9–10. The price.
11–15. Warranties.
16. Sale by sample.

### Transfer of Property and Title.

17–22. Transfer of property as between seller and buyer.
23–40. Transfer of title.

### Performance of the Contract.

41–51. Performance of the contract.

### Rights of Unpaid Seller Against the Goods.

52. Definition of unpaid seller.
53. Remedies of an unpaid seller.
54–56. Unpaid seller's lien.

# PART I.

## Formation of the Contract.

Section 1. (Contracts to Sell and Sales.) (1) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

(2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

(3) A contract to sell or a sale may be absolute or conditional.

(4) There may be a contract to sell or a sale between one part owner and another.

Section 2. (Capacity—Liabilities for Necessaries.) Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section means goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.

## Formalities of the Contract.

Section 3. (Form of Contract or Sale.) Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either

with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.

Section 4. (Statute of Frauds.) (1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upward[53] shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

### SUBJECT-MATTER OF CONTRACT.

Section 5. (Existing and Future Goods.) (1) The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after

53. States adopting this Act may change this amount.

the making of the contract to sell, in this act called "future goods."

(2) There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

Section 6. (Undivided Shares.) (1) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

(2) In the case of fungible goods, there may be a sale of an undivided share of specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share or the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.

Section 7. (Destruction of Goods Sold.) (1) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

(2) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated, in quality as to be substantially changed in character, the buyer may at his option treat the sale—

(a) As avoided, or

(b) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible or to pay the agreed price for the goods in which the property passes if the sale was divisible.

Section 8. (Destruction of Goods Contracted to be Sold.) (1) Where there is a contract to sell specific goods, and subsequently but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

(2) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract—

(a) As avoided, or

(b) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

## THE PRICE.

Section 9. (Definition and Ascertainment of Price.) (1) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

(2) The price may be made payable in any personal property.

(3) Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this act shall not apply.

(4) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Section 10. (Sale at a Valuation.) (1) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by Parts IV and V of this act.

### CONDITIONS AND WARRANTIES.

Section 11. (Effect of Conditions.) (1) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first-mentioned party may also treat the non-performance of the condition as a breach of warranty.

(2) Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his

obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

Section 12. (Definition of Express Warranty.) Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

Section 13. (Implied Warranties of Title.) In a contract to sell or a sale, unless a contrary intention appears, there is—

(1) An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass.

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.

(3) An implied warranty that the goods shall be free at the time of the sale from any charge or incumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

(4) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other persons professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

Section 14. (Implied Warranty in Sale by Description.) Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the

goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Section 15. (Implied Warranties of Quality.) Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is an implied warranty as to its fitness for any particular purpose.

(5) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(6) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

### SALE BY SAMPLE.

Section 16. (Implied Warranties in Sale by Sample.) In the case of a contract to sell or a sale by sample:

(a) There is an implied warranty that the bulk shall correspond with the sample in quality.

(b) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 47 (3).

(c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

# PART II.

## Transfer of Property and Title.

### Transfer of Property as Between Seller and Buyer.

Section 17. (No Property Passes until Goods are Ascertained.) Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6.

Section 18. (Property in Specific Goods Passes when Parties so Intend.) (1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

Sectoin 19. (Rules for Ascertaining Intention.) Unless a different intention appears, the following are rules for ascertaining the intention of the parties, as to the time at which the property in the goods is to pass to the buyer.

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for

the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Rule 3. (1) When the goods are delivered to the buyer "on sale or return", or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

(2) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer—

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction.

(b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4. (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods

to the contract, except in cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

Section 20. (Reservation of Right of Possession or Property when Goods are Shipped.) (1) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(3) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained

by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

(4) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

Section 21. (Sale by Auction.) In the case of sale by auction—

(1) Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

(3) A right to bid may be reserved expressly by or on behalf of the seller.

(4) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf,

or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

Section 22 (Risk of Loss.) Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that—

(a) Where the delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligation under the contract, the goods are at the buyer's risk from the time of such delivery.

(b) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

### TRANSFER OF TITLE.

Section 23. (Sale by a Person not the Owner.) (1) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Nothing in this act, however, shall affect—

(a) The provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

(b) The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

Section 24. (Sale by One Having a Voidable Title.) Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

Section 25. (Sale by Seller in Possession of Goods already Sold.) Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

Section 26. (Creditors' Rights against Sold Goods in Seller's Possession.) Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

Section 27. (Definition of Negotiable Document of Title.) A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title.

Section 28. (Negotiation of Negotiable Documents by Delivery.) A negotiable document of title may be negotiated by delivery:

(a) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer, or

(b) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.

Section 29. (Negotiation of Negotiable Documents by Indorsement.) A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

Section 30. (Negotiable Documents of Title Marked "Not Negotiable.") If a document of title which contains an undertaking by a carrier, warehouseman or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "Not negotiable," "non-negotiable" or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this act. But nothing in this act contained shall be construed as limiting or defining the effect

upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words "non-negotiable," or the like.

Section 31. (Transfer of Non-Negotiable Documents.) A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable document cannot be negotiated and the indorsement of such a document gives the transferee no additional right.

Section 32. (Who May Negotiate a Document.) A negotiable document of title may be negotiated:

(a) By the owner thereof, or

(b) By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person in whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery.

Section 33. (Rights of Person to Whom Document Has Been Negotiated.) A person to whom a negotiable document of title has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and

(b) The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

Section 34. (Rights of Person to Whom Document Has Been Transferred.) A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is non-negotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a non-negotiable document of title the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

Section 35. (Transfer of Negotiable Document Without Indorsement.) Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

Section 36. (Warranties on Sale of Document.) A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants:

(a) That the document is genuine.

(b) That he has a legal right to negotiate or transfer it.

(c) That he has knowledge of no fact which would impair the validity or worth of the document, and

(d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

Section 37. (Indorser not a Guarantor.) The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations.

Section 38. (When Negotiation not Impaired by Fraud, Mistake or Duress.) The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake or duress.

Section 39. (Attachment or Levy upon Goods for which a Negotiable Document Has Been Issued.) If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surren-

dered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

Section 40. (Creditors' Remedies to Reach Negotiable Documents.) A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such documents or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary process.

## PART III.

### Performance of the Contract.

Section 41. (Seller Must Deliver and Buyer Accept Goods.) It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.

Section 42. (Delivery and Payment are Concurrent Conditions.) Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for the possession of the goods.

Section 43. (Place, Time and Manner of Delivery.) (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not his residence, but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

(2) Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

Section 44. (Delivery of Wrong Quantity.) (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may ac-

cept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

Section 45. (Delivery in Installments.) (1) Unless otherwise agreed, the buyer of the goods is not bound to accept delivery thereof by installments.

(2) Where there is a contract to sell goods to be delivered by stated installments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more installments, or the buyer neglects or refuses to take delivery of or pay for one or more installments, it depends in each case on the terms of the contract and the circumstances of the case whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.

Section 46. (Delivery to a Carrier on Behalf of the Buyer.) (1) Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in cases provided for in section 19, Rule 5, or unless a contrary intent appears.

(2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to

treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

Section 47. (Right to Examine the Goods.) (1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to accept them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

(3) Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

Section 48. (What Constitutes Acceptance.) The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time,

he retains the goods intimating to the seller that he has rejected them.

Section 49. (Acceptance Does not Bar Action for Damages.) In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

Section 50. (Buyer is not Bound to Return Goods Wrongly Delivered.) Unless otherwise agreed, when goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.

Section 51. (Buyer's Liability for Failing to Accept Delivery.) When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

# PART IV.

## Rights of Unpaid Seller Against the Goods.

Section 52. (Definition of Unpaid Seller.) (1) The seller of goods is deemed to be an unpaid seller within the meaning of the act—

(a) When the whole of the price has not been paid or tendered.

(b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

(2) In this part of this act the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consigner or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

Section 53. (Remedies of an Unpaid Seller.) (1) Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of the goods, as such, has—

(a) A lien on the goods or right to retain them for the price while he is in possession of them;

(b) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

(c) A right of resale as limited by this act;

(d) A right to rescind the sale as limited by this act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage "in transitu" where the property has passed to the buyer.

### UNPAID SELLER'S LIEN.

Section 54. (When Right of Lien May be Exercised.) (1) Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

(a) Where the goods have been sold without any stipulation as to credit;

(b) Where the goods have been sold on credit, but the term of credit has expired;

(c) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Section 55. (Lien after Part Delivery.) Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

Section 56. (When Lien is Lost.) (1) The unpaid seller of goods loses his lien thereon—

(a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof;

(b) When the buyer or his agent lawfully obtains possession of the goods;

(c) By waiver thereof.

(2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

STOPPAGE IN TRANSITU.

Section 57. (Seller may Stop Goods on Buyer's Insolvency.) Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

Section 58. (When Goods are in Transit.) (1) Goods are in transit within the meaning of section 57—

(a) From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee;

(b) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

(2) Goods are no longer in transit within the meaning of section 57—

(a) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination;

(b) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further

destination for the goods may have been indicated by the buyer;

(c) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.

(3) If the goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(4) If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.

Section 59. (Ways of Exercising the Right to Stop.) (1) The unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.

(2) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or be justified in delivering the goods to the seller unless such document is first surrendered for cancellation.

### Resale by the Seller.

Section 60. (When and How Resale may be Made.) (1) Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

(3) It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

(4) It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

(5) The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

### Rescission by the Seller.

Section 61. (When and How the Seller May Rescind the Sale.) (1) An unpaid seller having a right of lien

or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failing to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer has been in default an unreasonable time before the right of rescission was asserted.

Section 62. (Effect of Sale of Goods Subject to Lien or Stoppage in Transitu.) Subject to the provisions of this act, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu.

## PART V.

### Actions for Breach of the Contract.

Remedies of the Seller.

Section 63. (Action for the Price.) (1) Where, under a contract to sell or a sale, the property of the goods has passed to the buyer, and the buyer neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

(3) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer thet the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

Section 64. (Action for Damages for Non-Acceptance of the Goods.) (1) Where the buyer wrongfully neglects

or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

(4) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.

Section 65. (When Seller May Rescind Contract or Sale.) Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

### Remedies of the Buyer.

Section 66. (Action for Converting or Detaining Goods.) Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

Section 67. (Action for Failing to Deliver Goods.) (1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

Section 68. (Specific Performance.) Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just.

Section 69. (Remedies for Breach of Warranty.) (1) Where there is a breach of warranty by the seller, the buyer may, at his election—

(a) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price;

(b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

(c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;

(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

(2) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

(3) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning and offering to return the goods to the seller and rescinding the sale.

(4) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been

paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 53.

(6) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

Section 70. (Interest and Special Damages.) Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

## PART VI.

### Interpretation.

Section 71. (Variation of Implied Obligations.) Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

Section 72. (Rights May be Enforced by Action.) Where any right, duty or liability is declared by this act, unless otherwise by this act provided, it may be enforced by action.

Section 73. (Rule for Cases not Provided for by this Act.) In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

Section 74. (Interpretation Shall Give Effect to Purpose of Uniformity.) This act shall be so interpreted and construed, if possible, as to effectuate its general purpose to make uniform the laws of those states which enact it.

Section 75. (Provisions not Applicable to Mortgages.) The provisions of this act relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge, or other security.

Section 76. (Definitions.) (1) In this act, unless the context or subject-matter otherwise requires—

"Action" includes counterclaim, set-off and suit in equity.

"Buyer" means a person who buys or agrees to buy goods or any legal successor in interest of such person.

"Defendant" includes a plaintiff against whom a right of set-off or counterclaim is asserted.

"Delivery" means voluntary transfer of possession from one person to another.

"Divisible contract to sell or sale" means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

"Document of title to goods" includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document.

"Fault" means wrongful act or default

"Fungible goods" means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale.

"Goods" include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

"Order" in sections of this act relating to documents of title means an order by indorsement on the document.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

"Plaintiff" includes defendant asserting a right of set-off or counterclaim.

"Property" means the general property in goods, and not merely a special property.

"Purchaser" includes mortgagee and pledgee.

"Purchases" includes taking as a mortgagee or as a pledgee.

"Quality of Goods" includes their state or condition.

"Sale" includes a bargain and sale as well as a sale and delivery.

"Seller" means a person who sells or agrees to sell goods, or any legal successor in interest of such person.

"Specific Goods" means goods identified and agreed upon at the time a contract to sell or a sale is made.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of titles are taken either in satisfaction thereof or as security therefor.

(2) A thing is done "in good faith" within the meaning of this act when it is is in fact done honestly, whether it be done negligently or not.

(3) A person is insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is solvent within the meaning of the federal bankruptcy law or not.

(4) Goods are in a "deliverable state" within the meaning of this act when they are in such a state that the buyer

would, under the contract, be bound to take delivery of them.

Section 77. (Inconsistent Legislation Repealed.) All acts or parts of acts inconsistent with this act are hereby repealed.

Section 78. (Time When the Act Takes Effect.) This act shall take effect on the ——— day of ———, one thousand nine hundred and ———.

Section 79. (Name of Act.) This act may be cited as the Sales Act.

# APPENDIX B.

## UNIFORM BILLS OF LADING ACT.

(Note: The following act is in force in Connecticut, Illinois, New York, Maryland, Ohio, Massachusetts and Pennsylvania. The Uniform Warehouse Receipt Law is a similar law. It divides warehouse receipts into two classes, "order" receipts, and "straight" receipts. The Warehouse Receipt Law is in force in California, Connecticut, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Wisconsin, District of Columbia.)

# APPENDIX B.

## UNIFORM BILLS OF LADING ACT.

Secs.
1–10. Issue of bills of lading.
11–27. Obligations and rights of carriers upon their bills of lading.
28–43. Negotiation and transfer of bills.
44–50. Criminal offenses.
51–56. Interpretation.

Section 1. Bills of lading issued by any common carrier shall be governed by this Act.

Sec. 2. Every bill must embody within its written or printed terms:

(a) The date of its issue,

(b) The name of the person from whom the goods have been received,

(c) The place where the goods have been received,

(d) The place to which the goods are to be transported,

(e) A statement whether the goods received will be delivered to a specified person, or to the order of a specified person,

(f) A description of the goods or of the packages containing them which may, however, be in such general terms as are referred to in section 23, and

(g) The signature of the carrier.

A negotiable bill shall have the words "order of" printed thereon immediately before the name of the person upon whose order the goods received are deliverable.

A carrier shall be liable to any person injured thereby for the damage caused by the omission from a negotiable bill of any of the provisions required in this section.

Sec. 3. A carrier may insert in a bill, issued by him, any other terms and conditions, provided that such terms and conditions shall not—

(a) Be contrary to law or public policy, or

(b) In any wise impair his obligation to exercise at least that degree of care in the transportation and safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.

Sec. 4. A bill in which it is stated that the goods are consigned or destined to a specified person, is a non-negotiable or straight bill.

Sec. 5. A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill, is a negotiable or order bill.

Any provision in such a bill that it is non-negotiable shall not affect its negotiability within the meaning of this Act.

Sec. 6. Negotiable bills issued in this State for the transportation of goods to any place in the United States on the continent of North America, except Alaska, shall not be issued in parts or sets.

If so issued the carrier issuing them shall be liable for failure to deliver the goods described therein to any one who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts.

Sec. 7. When more than one negotiable bill is issued in this State for the same goods to be transported to any place in the United States on the continent of North America, except Alaska, the word "duplicate" or some other word or words indicating that the document is not an original bill shall be placed plainly upon the face of every such bill, except the one first issued. A carrier shall be liable for the

damage caused by his failure so to do to any one who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill.

Sec. 8. A non-negotiable bill shall have placed plainly upon its face by the carrier issuing it "non-negotiable" or "not negotiable."

This section shall not apply, however, to memoranda or acknowledgments of an informal character.

Sec. 9. The insertion in a negotiable bill of the name of the person to be notified of the arrival of the goods shall not limit the negotiability of the bill, or constitute notice to a purchaser thereof of any rights or equities of such person in the goods.

Sec. 10. Except as otherwise provided in this Act, where a consignor receives a bill and makes no objection as hereinafter provided to its terms or conditions, neither the consignor or any person who accepts delivery of the goods, or any person who seeks to enforce any provision of the bill, shall be allowed to deny that he is bound by such terms and conditions, so far as they are not contrary to law or public policy.

Sec. 11. A carrier, in the absence of some lawful excuse, is bound to deliver goods upon the demand made either by the consignee named in the bill for the goods, or if the bill is negotiable, by the holder thereof, if such demand is accompanied by—

(a) An offer in good faith to satisfy the carrier's lawful lien upon the goods,

(b) An offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is negotiable and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure.

Sec. 12. A carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a non-negotiable bill for the goods, or

(c) A person in possession of a negotiable bill for the goods by the terms of which the goods are deliverable to his order, or which has been endorsed to him or in blank by the consignee or by the mediate or immediate indorsee of the consignee.

Sec. 13. Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to any one having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

A request or information to be effective within the meaning of this section must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must

be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods.

Sec. 14. Except as provided in section 27, and except when compelled by legal process, if a carrier delivers goods for which a negotiable bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to any one who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier, and notwithstanding delivery was made to the person entitled thereto.

Sec. 15. Except as provided in section 27, and except when compelled by legal process, if a carrier delivers part of the goods for which a negotiable bill had been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion of the goods has been delivered, with a description, which may be in general terms, either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill, to any one who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto.

Sec. 16. Any alteration, addition or erasure in a bill after its issue without authority from the carrier issuing the same, either in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor.

Sec. 17. Where a negotiable bill has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient surety to be approved by the court to protect the carrier or any person injured by such delivery from any liability or loss, incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees.

The delivery of the goods under an order of the court as provided in this section, shall not relieve the carrier from liability to a person to whom the negotiable bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

Sec. 18. A bill upon the face of which the word "duplicate" or some other word or words indicating that the document is not an original bill is placed plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability.

Sec. 19. No title to goods or right to their possession, asserted by a carrier for his own benefit, shall excuse him from liability for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien.

Sec. 20. If more than one person claims the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for non-delivery of the goods, or as an original suit, whichever is appropriate.

Sec. 21. If some one other than the consignee or person in possession of the bill, has a claim to the title or possession

of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods either to the consignee or person in possession of the bill, or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

Sec. 22. Except as provided in the two preceding sections and in section 12, no right or title of a third person unless enforced by legal process shall be a defense to an action brought by the consignee of a non-negotiable bill or by the holder of a negotiable bill against the carrier for failure to deliver the goods on demand.

Sec. 23. If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to—

(a) The consignee named in a non-negotiable, or

(b) The holder of a negotiable bill,

Who has given value in good faith relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier or a connecting carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.

If, however, the goods are described in a bill merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill, such statements, if true, shall not make liable the carrier issuing the bill, although the goods are not of the kind or quantity or in the condition which the marks

or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may, also, by inserting in the bill the words "shipper's load and count" or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the non-receipt or by the misdescription of the goods described in the bill.

Sec. 24. If goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner and a negotiable bill is issued for them, they cannot thereafter, while in the possession of the carrier, be attached by garnishment or otherwise, or be levied upon under an execution, unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court.

Sec. 25. A creditor whose debtor is the owner of a negotiable bill shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill, or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which can not readily be attached or levied upon by ordinary legal process.

Sec. 26. If a negotiable bill is issued the carrier shall have no lien on the goods therein mentioned, except for charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they

are allowed by law and the contract between the consignor and the carrier.

Sec. 27. After goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be negotiable.

Sec. 28. A negotiable bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank.

Sec. 29. A negotiable bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner.

Sec. 30. A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby.

A non-negotiable bill can not be negotiated, and the indorsement of such a bill gives the transferee no additional right.

Sec. 31. A negotiable bill may be negotiated by any person in possession of the same, however such possession may have been acquired if, by the terms of the bill, the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery.

Sec. 32. A person to whom a negotiable bill has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value, and

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him.

Sec. 33. A person to whom a bill has been transferred but not negotiated acquires thereby as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor. If the bill is non-negotiable, such person also acquires the right to notify the carrier of the transfer to him of such bill, and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor or transferee of a non-negotiable bill, the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time with the exercise of reasonable diligence to communicate with the agent or agents having actual possession or control of the goods.

Sec. 34. Where a negotiable bill is transferred for value by delivery, and the indorsement of the transfer or is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

Sec. 35. A person who negotiates or transfers for value a bill by indorsement or delivery, including one who assigns for value a claim secured by a bill, unless a contrary intention appears, warrants—

(a) That the bill is genuine,

(b) That he has a legal right to transfer it,

(c) That he has knowledge of no fact which would impair the validity or worth of the bill, and

(d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a bill the goods represented thereby.

In the case of an assignment of a claim secured by a bill, the liability of the assignor shall not exceed the amount of the claim.

Sec. 36. The indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations.

Sec. 37. A mortgagee or pledgee, or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or to warrant the genuineness of such bill or the quantity or quality of the goods therein described.

Sec. 38. The validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor, in good faith, without notice of the breach of duty or fraud, accident, mistake, duress or conversion.

Sec. 39. Where a person having sold, mortgaged, or pledged goods which are in a carrier's possession and for which a negotiable bill has been issued, or having sold, mortgaged, or pledged the negotiable bill representing such goods, continues in possession of the negotiable bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation.

Sec. 40. Where goods are shipped by the consignor in accordance with a contract or order for their purchase, the form in which the bill is taken by the consignor shall indicate the transfer or retention of the property or right to the possession of the goods as follows:

(a) Where by the bill the goods are deliverable to the buyer or to his agent, or to the order of the buyer or of his agent, the consignor thereby transfers the property in the goods to the buyer.

(b) Where by the bill the goods are deliverable to the seller or to his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill, the property would have passed to the buyer on shipment of the goods, the

seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(c) Where by the bill the goods are deliverable to the order of the buyer or his agent, but possession of the bill is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods, as against the buyer.

(d) Where the seller draws on the buyer for the price and transmits the draft and bill together to the buyer to secure acceptance or payment of the draft, the buyer is bound to return the bill if he does not honor the draft, and if he wrongfully retains the bill he acquires no added right thereby. If, however, the bill provides that the goods are deliverable to the buyer, or to the order of the buyer, or is endorsed in blank or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill or goods from the buyer, shall obtain the title to the goods, although the draft has not been honored, if such purchaser has received delivery of the bill indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

Sec. 41. Where the seller of goods draws on the buyer for the price of the goods and transmits the draft and a bill of lading for the goods either directly to the buyer or through a bank or other agency, unless a different intention on the part of the seller appears, the buyer and all other parties interested shall be justified in assuming:

(a) If the draft is by its terms or legal effect payable on demand or presentation or at sight, or not more than three days thereafter (whether such three days be termed days of grace or not), that the seller intended to require payment of the draft before the buyer should be entitled to receive or retain the bill.

(b) If the draft is by its terms payable on time, extending beyond three days after demand, presentation or sight (whether such three days be termed days of grace or not), that the seller intended to require acceptance, but not payment of the draft before the buyer should be entitled to receive or retain the bill.

The provisions of this section are applicable whether by the terms of the bill the goods are consigned to the seller, or to his order, or to the buyer, or to his order, or to a third person, or to his order.

Sec. 42. Where a negotiable bill has been issued for goods, no seller's lien or right of stoppage *in transitu* shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage *in transitu*. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation.

Sec. 43. Except as provided in section 42, nothing in this Act shall limit the rights and remedies of a mortgagee or lienholder whose mortgage or lien on goods would be valid, apart from this Act, as against one who for value and in good faith purchased from the owner, Immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien and obtained possession of them.

Sec. 44. Any officer, agent, or servant of a carrier, who with intent to defraud issues or aids in issuing a bill knowing that all or any part of the goods for which such bill is issued have not been received by such carrier, or by an agent of such carrier or by a connecting carrier, or are not under the carrier's control at the time of issuing such bill, shall be guilty of a crime, and upon conviction shall be punished

for each offense by imprisonment in the State penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

Sec. 45. Any officer, agent, or servant of a carrier, who with intent to defraud issues or aids in issuing a bill for goods knowing that it contains any false statement, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment in the State penitentiary not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

Sec. 46. Any officer, agent, or servant of a carrier, who with intent to defraud issues or aids in issuing a duplicate or additional negotiable bill for goods in violation of the provisions of section 7, knowing that a former negotiable bill for the same goods or any part of them is outstanding and uncancelled, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment in the State penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

Sec. 47. Any person who ships goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable bill which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment in the State penitentiary not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

Sec. 48. Any person who with intent to deceive negotiates or transfers for value a bill knowing that any or all of the goods which by the terms of such bill appears to have been received for transportation by the carrier which issued the bill, are not in the possession or control of such carrier, or of a connecting carrier, without disclosing this fact, by causing said fact to be endorsed shall be guilty of a

crime, and upon conviction shall be punished for each offense by imprisonment in the State penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

Sec. 49. Any person who with intent to defraud secures the issue by a carrier of a bill knowing that at the time of such issue, any or all of the goods described in such bill as received for transportation have not been received by such carrier, or an agent of such carrier or a connecting carrier, or are not under the carriers control, by inducing an officer, agent, or servant of such carrier falsely to believe that such goods have been received by such carrier, or are under its control, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment in the State penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

Sec. 50. Any person who with intent to defraud issues or aids in issuing a non-negotiable bill without the words "not negotiable" placed plainly upon the face thereof, shall be guilty of a crime, and upon conviction shall be punished for each offense by imprisonment in the State penitentiary not exceeding five years or by a fine not exceeding five thousand dollars, or by both.

Sec. 51. In any case not provided for in this Act the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent, executors, administrators and trustees, and to effect of fraud, misrepresentation, duress or coercion, accident, mistake, bankruptcy, or other invalidating cause, shall govern.

Sec. 52. This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Sec. 53. (1) In this Act, unless the context or subject matter otherwise requires—

"Action" includes counter claim, set-off, and suit in equity.

"Bill" means bill of lading.

"Consignee" means the person named in the bill as the person to whom delivery of the goods is to be made.

"Consignor" means the person named in the bill as the person from whom the goods have been received for shipment.

"Goods" means merchandise or chattels in course of transportation, or which have been or are about to be transported.

"Holder" of a bill means a person who has both actual possession of such bill and a right of property therein.

"Order" means an order by indorsement on the bill.

"Owner" does not include mortgagee or pledgee.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee and to take as pledgee.

"Purchaser" includes mortgagee and pledgee.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a bill is taken either in satisfaction thereof or as security therefor.

(2) A thing is done "in good faith," within the meaning of this Act, when it is in fact done honestly, whether it be done negligently or not.

Sec. 54. The provisions of this Act do not apply to bills made and delivered prior to the taking effect thereof.

Sec. 55. All Acts or parts of Acts inconsistent with this Act are hereby repealed.

Sec. 56. This Act may be cited as the Uniform Bills of Lading Act.

# APPENDIX C.

## FORMS.

# APPENDIX C.

## FORMS.

**1. Bill of Sale.**

KNOW ALL MEN BY THESE PRESENTS, THAT Henry Sampson of the City of Chicago in the County of Cook and State of Illinois, party of the first part, for and in consideration of the sum of Four Hundred and Fifty ($450) Dollars, lawful money of the United States of America, to him in hand paid, at or before the ensealing and delivery of these Presents, by Lester McAuley, of the same place, party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and delivered, and, by these Presents, does grant, bargain, sell and deliver, unto the said party of the second part, all the following GOODS, CHATTELS, and PROPERTY, to-wit:

1 roll top, black walnut office desk, one desk chair, 4 sections Empire book cases, with top and bottom, and 1 set of Illinois Reports, volumes 1 to 240 inclusive.

To have and to hold the said Goods, Chattels and Property unto the said party of the second part, his heirs, executors, administrators and assigns, to and for his own proper use and behoof, forever.

And the said party of the first part does vouch himself to be the true and lawful owner of the said Goods, Chattels and Property, and have in himself full power, good right and lawful authority, to dispose of the said Goods, Chattels and Property, in manner as aforesaid: And he does, for himself, his heirs, executors and administrators, covenant and agree to and with the said party of the second part, to Warrant and Defend the said Goods, Chattels and Property to

the said party of the second part, his executors, administrators, and assigns, against the lawful claims and demands of all and every person and persons whomsoever.

In Witness Whereof, I have hereunto set my hand and seal the first day of August in the year One Thousand Nine Hundred and Eleven.

Sealed and delivered in presence of

WILLIAM JONES. (sd.) HENRY SAMPSON. [SEAL]

.....[SEAL

STATE OF ILLINOIS, COOK COUNTY, ss.

I, James H. Zabel, a notary public, in and for said County, DO HEREBY CERTIFY, that this Instrument was duly acknowledged before me, by the above named Henry Sampson, this first day of August, A. D. 1911.

JAMES H. ZABEL,

[NOTARIAL SEAL] Notary Public.

**2. Memorandum of Sale.**

(NOTE: As stated in the text, it is not necessary to put contracts of sale in writing except as required by the statute of frauds. If there is delivery of all or part, or payment of all or part of the purchase price, writing becomes unnecessary. It may be desirable, however, to give a formal bill of sale, but in mercantile contracts such formal instruments are seldom made use of. Personal chattels, unlike real estate seldom stand in any one's name as a matter of record, and although formal deeds are always used and must be used in transfers of real estate, formal bills of sale are comparatively rare. One has only to think of what transpires when he purchases merchandise at a retail store to have this impressed upon him. A brief memorandum is here given that will fulfill the requirements of the statute of frauds, or may be used for other reasons to preserve the evidence of the transaction).

Chicago, August 1, 1911.

John Smith has this day sold to James Hicks, his black horse, named Tom, weight about 1400 pounds, white spot on forehead, for the sum of Two Hundred Dollars, One Hundred Dollars of which has been paid, the receipt of which is hereby acknowledged, and the other hundred dollars of which is to be paid in six months, as evidenced by the promissory note of the purchaser of same date as this memorandum. The said John Smith warrants the said horse to be sound in all respects and a good buggy horse. It is agreed that the said Hicks may keep the horse in said Smith's pasture during the month of August, 1911, without charge if he so desires.

John Smith.
James Hicks.

The following is a memorandum made by an agent which was held sufficient to satisfy the statute of frauds:

"February 29 bought of Isaac Clason, of Bailey & Voorhees, 3,000 bushels of good merchantable rye, deliverable from the 5th to the 15th of April next, at $1.00 per bushel, and payable on delivery" (Clason v. Bailey, 14 Johns. Reports, (N. Y.) 484).

3. Chattel Mortgage.

(As a chattel mortgage is so often given in sale transactions, to secure a portion or all of the purchase price, a form is here given. It is better to use the printed blanks to be secured of the stationers, for these are drawn in compliance with local statutes and customs.)

Know all Men by these Presents, That A. B., of the city of.....in the County of.....and State of ..... in consideration of the sum of.....Dollars, to him paid by C. D., of the County of.....and State of.....the receipt whereof is hereby acknowledged

does hereby GRANT, SELL, CONVEY and CONFIRM, unto the said C. D. and to his heirs and assigns, the following GOODS AND CHATTELS, to-wit: (here describe goods mortgaged so that they may be identified from the description, stating the place where the goods are located).....
.....
.....
.....
.....

**To Have and to Hold**, All and singular the said Goods and Chattels, unto the said Mortgagee..herein, and his heirs, executors, administrators and assigns, to his and their sole use, FOREVER. And the Mortgagor..herein, for himself and for his heirs, executors and administrators, does hereby covenant to and with the said Mortgagee.., his heirs, executors, administrators and assigns, that said Mortgagor is lawfully possessed of the said Goods and Chattels, as of his own property; that the same are free from all incumbrances, and that he will, and his executors and administrators shall warrant and defend the same to him, the said Mortgagee, his heirs, executors, administrators and assigns, against the lawful claims and demands of all persons.

**Provided, Nevertheless,** That if the said Mortgagor.., his executors or administrators, shall well and truly pay unto the said Mortgagee , his executors, administrators or assigns.....
.....
.....
.....
.....
then said Mortgage is to be void, otherwise to remain in full force and effect.

**And, Provided, also,** That it shall be lawful for the said Mortgagor.., his executors, administrators and assigns, to

retain possession of the said GOODS AND CHATTELS, and at his own expense, to keep and to use the same, until he or his executors, administrators or assigns, shall make default in the payment of the said sum of money above specified, either in principal or interest, at the time or times and in the manner hereinbefore stated. AND the said Mortgagor hereby covenant and agree that in case default shall be made in the payment of the Note aforesaid, or, any part thereof, or the interest thereon, on the day or days respectively, on which the same shall become due and payable; or if the Mortgagee , his executors, administrators or assigns, shall feel himself insecure or unsafe or shall fear diminution, removal or waste of said property; or if the Mortgagor shall sell or assign, or attempt to sell or assign, the said Goods and Chattels or any interest therein; or if any Writ, or any Distress Warrant, shall be levied on said Goods and Chattels, or any part thereof; then, and in any or either of the aforesaid cases, all of said Note and sum of money, both principal and interest, shall, at the option of the said Mortgagee , his executors, administrators or assigns, without notice of said option to anyone, become at once due and payable, and the said Mortgagee, his executors, administrators or assigns, or any of them shall thereupon have the right to take immediate possession of said property, and for that purpose may pursue the same wherever it may be found, and may enter any of the premises of the Mortgagor with or without force or process of law, wherever the said Goods and Chattels may be, or be supposed to be, and search for the same, and if found, take possession of, and remove, and sell, and dispose of the said property, or any part thereof, at public auction, to the highest bidder, after giving.....days' notice of the time, place and terms of sale, together with a description of the property to be sold, by notices posted up in three public places in the vicinity

of such sale, or at private sale, with or without notice, for cash or on credit, as the said Mortgagee , his heirs, executors, administrators or assigns, agents or attorneys, or any of them, may elect; and out of the money arising from such sale, to retain all costs and charges for pursuing, searching for, taking, removing, keeping, storing, advertising and selling such Goods and Chattels, and all prior liens thereon, together with the amount due and unpaid upon the said Note , rendering the surplus, if any remain, unto said Mortgagor , or his legal representatives.

Witness The hand and seal of the said Mortgagor this .....day of.....in the year of our Lord One Thousand Nine Hundred.....

.....[SEAL]

.....[SEAL]

Sealed and Delivered in the Presence of

.....

.....

State of Illinois, COUNTY OF COOK, CITY OF CHICAGO, SS.

I,.....Clerk of the Municipal Court of Chicago, DO HEREBY CERTIFY that this mortgage was duly acknowledged before me by the above named.....the Mortgagor therein named, and entered by me this..... day of.....A. D. 191..

Witness my hand and the seal of said court.

.....

[SEAL] Clerk of the Municipal Court of Chicago.

**4. Chattel Mortgage Note.**

$..... .....191..

.....after date for Value Received,.....promise to pay to the Order of.....the sum of.....DOLLARS, at.....with interest thereon at the rate of..... per cent. per annum, payable.....annually.

This Note is secured by a Chattel Mortgage to..... of even date herewith, on personal property in....., and is to bear interest at the rate of.....per cent. per annum after.....

No..... .....

**5. Uniform "Order" Bill of Lading.**

Uniform Bill of Lading—Standard form of Order Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908.

_____ **Railroad Company.** Shipper's No._____

**ORDER BILL OF LADING—ORIGINAL**

Agent's No._____

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading, at _____ 19_____ from _____

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of this Original ORDER Bill of Lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by shipper.

**The rate of freight from_____to_____is in Cents per 100 lbs.**

| OFFICIAL CLASSIFICATION | | | | | | | | | | IF Special per_____ | IF Special per_____ |
|---|---|---|---|---|---|---|---|---|---|---|---|
| IF Times 1st | IF 1st Class | IF 2d Class | IF Rule 25 | IF 3d Class | IF Rule 26 | IF Rule 28 | IF 4th Class | IF 5th Class | IF 6th Class | | |
| | | | | | | | | | | | |

The Rate of Freight from ..... to ..... is in Cents per 100 lbs.

WESTERN CLASSIFICATION

| IF Times 1st | IF 1st Class | IF 2d Class | IF 3d Class | IF 4th Class | IF 5th Class | IF Class A | IF Class B | IF Class C | IF Class D | IF Class E | IF Special per ..... |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | | |

Consigned to ORDER OF ..... (Mail Address—Not for purposes of Delivery.)

Destination ..... State of ..... County of .....

Notify .....

At ..... State of ..... County of .....

Route ..... Car Initial ..... Car No. .....

| No. Pakgs. | Description of Articles and Special Marks | WEIGHT (Subject to correction) | CLASS OR RATE | Check Column |
|---|---|---|---|---|
| | | | | |

If charges are to be prepaid, write or stamp here, "To be Prepaid."
Received $.....
to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.
Per .....
(The signature here acknowledges only the amount prepaid.)
Charges Advanced:
$.....

Per ..... Shipper.

Per ..... Agent.

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)
(Endorsed on the back thereof.)

(Space for Endorsements.)

CONDITIONS.

**Sec. 1.** The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

**Sec. 2.** In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed

by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

**Sec. 3.** No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight charges if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of Insurance.

**Sec. 4.** All property shall be subject to neccessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator may (unless otherwise expressly noted

herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

**Sec. 5.** Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves or landings, shall be at owner's risk until the cars are attached to and after they are detached from trains.

**Sec. 6.** No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

**Sec. 7.** Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

**Sec. 8.** The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

**Sec. 9.** Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

**Sec. 10.** Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(In connection with the above Original Bill, 2 other forms are used, substantially copies thereof, and which may be filled out at the same time by use of carbon paper.)

The first of these two forms is called a "shipping order" and the beginning thereof reads as follows:

For use in connection with the Standard form of Order Bill of Lading approved by the Interstate Commerce Commission by order No. 787 of June 27, 1908.

. . . . **Railroad Company** Shipper's No. . . . **Agent's No.** . . . . This Shipping Order must be

legibly filled in, in ink, in indelible pencil, or in carbon, and retained by the agent.

Receive, subject to the classifications and tariffs in effect on the date of issue of this Shipping Order, at. . . . . 19 . from . . . . the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of the Original Order Bill of Lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

Note that this differs from the original in that it consists of an Order, to be retained by the agent, and reads "receive" instead of "Received" and refers to "The Original Order Bill," the original bill reading "the surrender of This Original Order Bill, etc." This form has no place for indorsement as the original has, for only the original can be indorsed.

The second of these forms is called a "Memorandum" and is to be retained by the shipper, and the beginning thereof reads as follows.

For use in connection with the Standard form of Order Bill of Lading approved by the Interstate Commerce Commission by order No. 787 of June 27, 1908

. . . . Railroad Company Shipper's No. . . . , Agent's No. . . . . This Memorandum is an acknowledgment that a bill of lading has been issued and is not the Original Bill of Lading, nor copy or duplicate,

covering the property named herein, and is intended solely for filing or record.

Received, subject to the classification and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading at. . . . 19 . . from . . . . the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destinatiou. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of the Original Order Bill of Lading properly indorsed shall be required before the delivery of the property Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

**6. Straight Bill of Lading.**

(Note: a straight bill of lading differs from an order bill in that it reads "Consigned to" instead of "Consigned to the order of." It omits entirely the clause "The Surrender of this Original," etc., contained in the order bill.)

# APPENDIX D.

## QUESTIONS AND PROBLEMS

# APPENDIX D.

## QUESTIONS AND PROBLEMS

### CHAPTER ONE.

1. Define "sale," "contract to sell," "barter," "gift," "bailment."

2. In what two senses is the term "conditional sale" used? What sort of transaction is it most commonly used to describe?

3. A delivered logs to B which B was to cut into boards, half of which he was to retain for his services, returning the rest. When the logs are delivered to B and are yet uncut by him, do they belong to A or B?

4. A delivered milk to B to be manufactured into cheese, the cheese to be sold by B to patrons. B was to retain two cents a pound for making the cheese and four cents for selling it. B having made a large quantity of the cheese from milk delivered by A, went into bankruptcy. B's trustee claims the cheese as part of B's estate to be sold for division among B's creditors. Is this claim valid?

5. A, a coffee wholesaler appointed B his "special selling agent" and provided that he should ship coffee to B as B should order it and that B was to account and pay for the same within sixty days after every consignment. B could sell as he chose, to whom he chose, on what terms he chose and had no right to return any of the coffee if unsold, but was to pay for the coffee at all events. There was, however, a clause, in the contract between A and B that the title to the coffee should remain in A. B made an assignment for the benefit of his creditors having some of the coffee on hand. A's and B's assignees both claim the coffee. How do you think the case should be decided?

6. What are fungible goods? A delivers wheat to B to be mixed by B with wheat of like quality, B to return a like quantity on demand. Is this a bailment? A delivers 100 logs to B which B has the right to pile indiscriminately with similar logs, B to return the same logs or logs substantially the same when A shall demand. A makes a demand on B for 100 logs according to this agreement. B refuses to return any logs, asserting that these logs and two hundred more with which they were piled have been seized by the sheriff on account of a judgment against B obtained by C, one of B's creditors. A then seeks by legal proceedings to obtain 100 logs from the sheriff, alleging that they are his property. Do you think A can prevail? Why? Has B broken his contract in failing to deliver the logs under these circumstances?

## CHAPTER TWO.

7. What was the purpose of the statute of frauds? Is that part of it which provides for the sale of personal property in force in all the states?

8. State three circumstances under which one can prove a contract for the sale of personal property where there is no signed memorandum, although the statute of frauds is in force.

9. B employed A, an auctioneer, to sell a miscellaneous lot of articles. The first article put up was a clock which was bid in by C for $20.00. The tenth article put up was a book case which C bid in for $35.00. There was a statute of frauds in force for contracts of sale of $50.00 and upwards. C, regretting his bargain, claimed the defense of the statute of frauds. B claims, first, that the statute of frauds does not apply; second, that the auctioneer entered the terms of the sale upon his books. Discuss both of these contentions.

10. Must the memorandum be of a formal character? Must the signature be at the bottom of the writing? Can the memorandum and signature be made by agent? Must the agent's authority be in writing? Must both parties (personally or by agent) sign the memorandum?

11. A orally sold some stacks of hay to B for $100 (statute of frauds $50). B sent his servants to bale the hay and cart it away. About twenty minutes after the men began work the stacks caught fire and burned down. B claims there was no delivery and acceptance to take the case out of the statute of frauds. What do you think?

12. A, a dentist, contracted with B to make B a set of teeth especially fitted for B's mouth. After the teeth were finished B without just excuse refused to accept them. Now he is sued and pleads the statute of frauds. A claims the statute of frauds does not apply to this sort of a transaction. How should the case be decided under the Uniform Sales Act?

## CHAPTER THREE.

13. Define potential existence.

14. If goods are destroyed before an agreement is made for their sale, what is the effect of the agreement? If destroyed afterwards, but before title passes, what result? If after title passes?

15. (a) A had a coal mine and contracted in writing to deliver B 100,000 tons of coal out of that mine. The mine yielded only 70,000 tons of coal. B sues A for breach of contract for failure to deliver the other 30,000 tons. How should the case be decided? (b) A is a coal dealer. He contracts to deliver B 100,000 tons of a certain grade and kind of coal. On account of a strike at the mines he is unable to deliver more than 70,000 tons within the time set. Has he broken his contract? Why?

## CHAPTER FOUR.

16. What two sorts of warranties are there?

17. If one says that a horse is sound is it a warranty or a mere opinion? Suppose he says "These stocks will be a good buy" believing that they will not be, is there any remedy if the assertion turns out untrue?

18. Define an implied warranty? What is the rule of *caveat emptor?*

19. A sold B a horse. A had previously mortgaged the horse to C and the mortgage was still outstanding and had been duly recorded before the sale. C now begins an action to foreclose the mortgage. What rights has B? Why?

20. A ordered of B two car loads of "beef cattle." B accepted the order and selected two car loads of cattle and shipped them to A. They were not good beef cattle, but B refused to take them back. What defenses may A make against B when sued for the price?

21. What is meant by the term "merchantability?" Under what circumstances is a warranty implied that goods are merchantable?

22. A was negotiating to sell B some hemp in bales which A had bought from M, already bailed. B was told by the seller to examine the hemp for himself. B examined one bale and might have examined the remainder, but being satisfied after his inspection of the one, he bought the entire lot. Some of the other bales (unknown to A or B) contained inferior hemp. Can B hold A upon any warranty?

23. A ordered a steam cylinder to be made by B and he sent specifications by which it was to be made. B made the cylinder as ordered. He knew A's purpose. The cylinder was not fit for the purpose intended but was well made and of good material. Has A any rights against B?

24. What is the rule where goods are bought by patent or trade name in respect to fitness for particular use? In such a case is there a warranty of merchantability?

25. What warranty is there where goods are purchased from a dealer in such goods, for purposes of consumption by the buyer?

26. A was a manufacturer of mincemeat. He sold a lot of canned mincemeat to B, a distributor, who sold to C, a wholesaler, who sold to D, a retail dealer, who sold to E, a consumer, who made mincemeat pie which was partaken of by F, a boarder in E's family. F became sick by reason of poison in the mincemeat. Has F any rights against A?

## CHAPTER FIVE.

27. State some reasons why it is important to determine when title shall pass.

28. A sold B forty head of cattle giving B the right to select them from a herd of one hundred cattle What is the earliest point of time at which title can pass? Suppose that A afterward refused to allow B to make the selection. What is A's remedy?

29. A ordered B, a carriage maker, to make him a buggy out of materials to be furnished by the carriage maker. After the carriage was fully completed, A told B it was acceptable but that he did

not care to take it away until the roads were in a better condition. Afterwards the shop caught fire and all its contents were destroyed. Must A pay for the buggy?

30. Suppose that in the last case, B, having a right to do so, had told A he could not have the buggy until he paid for it. Would this affect the passing of title?

31. Suppose in the same case, at the time of the fire, the buggy was as yet in an incomplete state, although A had often watched progress upon it and expressed satisfaction with the work. Upon whom would loss fall?

32. A in one state, shipped butterine to B in another state "collect on delivery." While the goods were in transit who had the title?

33. What is meant by *jus disponendi?* Name two ways of preserving upon shipment the *jus disponendi.*

34. What is meant by the initials "F. O. B." What effect, if any, do they have upon the passing of title?

35. As a general rule, who assumes the risk of the loss or damage of the goods? What is a seeming exception? Why is the rule different in that case?

36. Can a thief give good title to stolen chattels? Can he give good title to money to an innocent taker for value?

37. A desired to open a branch store in a suburb. He put B in possession as general manager. B without A's knowledge changed the signs and announced that he had bought the store. He thereupon sold the entire stock in trade to C and absconded with the money. A claims the goods from C, the purchaser. Has A or C the better title? Why?

38. What provision is made in most states in respect to conditional sales of goods in which the seller reserves title in himself for purposes of security but delivers possession of the goods to the buyer?

39. A sent a book by mail to B, a second hand book seller, requesting B to make him an offer. B sold the book to C who found the book on one of B's shelves and supposed it to be B's book. C gave $100 for it. Can A recover the book from C?

40. A delivered a share of stock to B, a stockbroker, to secure a loan by B to A. A endorsed in blank the stock certificate and the power of sale in the ordinary form on the back thereof. B sold the certificate to C. Can A recover from C?

41. A sold his stock in trade and good will to B. B left A in possession, saying that he was not ready to go into possession. The signs were unchanged and nothing was done to apprise the public of any change. A thereupon resold to C. What are the rights of B and C?

## CHAPTER SEVEN.

42. What is meant by a document of title? Name the two chief documents of title.

43. What documents of title in some states are negotiable? If not negotiable may a document of title nevertheless be transferred? What, then, is the distinction between a document of title which is negotiable and one which is non-negotiable.?

44. Are documents of title negotiable in the sense that bills of exchange, promissory notes and checks are negotiable? Why?

45. A has some goods in a warehouse for which he holds a warehouse receipt. B desire to purchase the goods. A endorses and transfers the warehouse receipt to B on July 1st. On July 15, B gives notice to the warehouseman that he has the warehouse receipt. On August 1st, he appears and claims the goods and they are delivered to him. At what time did the goods become his?

## CHAPTER EIGHT.

46. What is the rule as to the construction of a contract of sale in respect to time? What is meant by the phrase "time is of the essence" of a contract of sale of personal property?

47. What two different constructions can be given to the words "more or less" used in connection with a recital of the quantity of goods sold?

## CHAPTER NINE.

48. A ordered wheat from B to be delivered on Monday. B accepted the order. He delivered the wheat Tuesday. A's tardiness caused B a loss. Can B claim damages or does his acceptance bar him?

49. A ordered by descrip . a car load of good merchantable apples of B of a certain kind. B sent a car load of apples that were beginning to rot. A accepted the apples wiring B that he received them under protest. He resold them to C at a substantial loss. Can he refuse to pay B when sued? Can he recoup his damage?

## CHAPTER TEN.

50. A sold and delivered B a horse on credit. When the term of credit expired, B had not paid for the horse. Can A secure the horse?

51. What is an "unpaid seller's lien"?

52. What is the right of stoppage in transit? How is it defeated by the act of the buyer when the goods are in transit?

53. If the seller has not parted with the goods, what rights besides his lien has he? How does he lose his lien?

## CHAPTER ELEVEN.

54. A was negotiating with B for the purchase of a horse. A asked B if the horse was sound. B replied that the horse was sound so far as he knew. In fact the horse was unsound and B knew it. A purchased the horse and paid $100 therefor as agreed upon. On using the horse he discovered the unsoundness. What are his rights?

55. A sold to B a herd of cattle which was afflicted with a contagious disease. B could not by ordinary inspection discover the fault and nothing was said by either party in reference to the disease. A knew of the disease but refrained from saying anything about it. Has B any rights growing out of the concealment?

56. A tried to sell a horse to B. B offered him $100. A refused to accept it. He then attempted to sell to C, and informed C

that B (whom C knew to be a practical horseman) had offered him $200. Thereupon C gave A $200. What are C's rights?

57. What is the rule as to a statement of an opinion by the seller relied upon by the buyer?

58. What constitutes a ratification of a contract secured by fraud?

## CHAPTER TWELVE.

59. When may the parties to a sale of personal property have specific performance?

60. If title has passed and the seller wrongfully refuses to deliver may the buyer obtain the possession of the goods?

# INDEX.

(References are to sections.)

## A.



## B.



## C.

(References are to sections.)

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T.



U.



W.


ROGER W. PRIOR,